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V. 3060
No. 15,821

**In the United States Court of Appeals
for the Ninth Circuit**

**JOHN R. HANSEN and SHIRLEY G. HANSEN,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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No. 15,821

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 65-68) is not officially reported.

JURISDICTION

This petition for review (R. 74) involves deficiencies in federal income tax for 1951, 1952 and 1953, in the respective amounts of \$1,092.66, \$686.40, and \$3,221.46, plus penalties,¹ for substantial underesti-

¹ In this appeal the taxpayer is not disputing the penalties imposed for failure to file declarations of estimated tax

mation of estimated tax, in the amounts of \$565.10, \$375.67, and \$355.10. Taxpayer's income tax returns were filed with the Collector of Internal Revenue at Tacoma, Washington. On January 27, 1956, the Commissioner of Internal Revenue mailed the taxpayer a notice of deficiency in the total amount of \$6,903.30, plus penalties of \$3,525.11. (R. 7, 15-25.) Within 90 days thereafter, and on April 26, 1956, taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3.) An amended petition was filed at the hearing on February 11, 1957. (R. 3, 7-25.) The decision of the Tax Court was entered on August 5, 1957. (R. 70.) The case is brought to this Court by a petition for review filed November 4, 1957. (R. 74-75.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. During 1951, 1952 and 1953, taxpayer, an accrual basis automobile dealer, assigned conditional sales contracts to a finance company in exchange for the amounts set forth in the contracts. A part of the proceeds of the sale of the contracts was withheld by the finance company and credited to a reserve account

under 1939 Code Section 294(d)(1)(A) in the respective amounts of \$847.66, \$563.51 and \$532.64. (R. 70; Br. 3.) For convenience, John R. Hansen will be referred to herein as the taxpayer, although Shirley G. Hansen is also a petitioner, inasmuch as she filed joint returns with her husband for the taxable years involved.

in the taxpayer's name on the finance company's books. Were the amounts withheld and credited to the reserve account income to the taxpayer in the years withheld and credited?

2. Where taxpayer filed no declarations of estimated tax in 1951, 1952 and 1953, and has conceded his liability for penalties imposed under 1939 Code Section 294(d)(1)(A), is taxpayer liable for penalties for a substantial underestimation of estimated tax for the taxable years under 1939 Code Section 294(d)(2)?

STATUTES AND OTHER AUTHORITIES INVOLVED

The applicable provisions of the Statute and other authorities are printed in the Appendix, *infra*.

STATEMENT

A portion of the facts was stipulated. (R. 5-6.) The findings of the Tax Court (R. 61-65) may be summarized as follows:

Taxpayer is a Buick automobile dealer engaged in the business of selling automobiles at retail, under conditional sales contracts providing for payment of the purchase price in installments, using a form of contract provided by the General Motors Acceptance Corporation (hereinafter referred to as GMAC). This contract called for a "Total Time Price" for the automobile sold. This price was computed by subtracting the down payment including the trade-in, if any, from the "Cash Sale Delivered Price" and adding to this difference the cost of any insurance and finance charges. Thus an amount was arrived at

called the "Time (Deferred) Balance." The down payment was added back to the latter amount to fix the "Total Time Price." (R. 61.)

The form contract included the following endorsement, which was executed by taxpayer upon assignment of the contract to GMAC (Stip. Ex. 5-E; R. 6, 39-40, 62-63) :

For value received, undersigned does hereby sell, assign and transfer to the General Motors Acceptance Corporation his, its or their right, title and interest in and to the within contract, herewith submitted for purchase by it, and the property covered thereby and authorizes said General Motors Acceptance Corporation to do every act and thing necessary to collect and discharge the same.

The undersigned certifies that said contract arose from the sale of the within described property, warranting that title to said property was at time of sale and is now vested in the undersigned free of all liens and encumbrances; that said property is as represented to the purchaser of said property by the undersigned and that statements made by the purchaser of said property on the statement form attached hereto are true to the best of the knowledge and belief of the undersigned.

In consideration of your purchase of the within contract, undersigned guarantees payment of the full amount remaining unpaid hereon, and covenants if default be made in payment of any instalment herein to pay the full amount then unpaid to General Motors Acceptance Corporation upon demand, except as otherwise provided by the terms of the present General Motors Ac-

ceptance Corporation Retail Plan. Liability of the undersigned shall not be affected by any indulgence, compromise, settlement, extensions or variation of terms of the within contract effected with, or by the discharge or release of the obligation of the purchaser or any other person interested, by operation of law or otherwise. Undersigned waives notice of acceptance of this guaranty and notices of non-payment and non-performance.

Taxpayer financed all of his conditional sales during 1951, 1952, and 1953 through GMAC. He assigned his contracts pursuant to the terms of the endorsement contained thereon, in exchange for the amount set forth in the contract, but reduced by an amount withheld and placed in a reserve account. There was no specific contract with GMAC requiring taxpayer to assign any of his contracts to GMAC. Taxpayer was not required to assign any of his contracts to GMAC or to any other finance company and could hold such contracts himself without assignment. (R. 63.)

A reserve account was maintained between taxpayer and GMAC under which at least 5% of the outstanding balances of the contracts assigned to GMAC were retained by it. This reserve was maintained in order to protect GMAC against any loss arising from the repossession of any automobile in case of default in payment. Also, in the event of prepayment by a customer, the proportionate reduction in finance charges was charged to the reserve. (R. 63-64.)

Taxpayer's books of account and income tax re-

turns were maintained and filed on an accrual method of accounting. Taxpayer had opening and closing inventories and accounts receivable. He charged off bad debts specifically as they became worthless. (R. 64.)

In reporting income from his automobile business and in maintaining his accounts, taxpayer debited the amount placed in the reserve to an account entitled "Due Finance Company" and credited an account entitled "Reserve for Repossession." In his income tax returns for 1951 and 1953 taxpayer did not include in income the amounts withheld by GMAC.² These amounts were placed in the reserve account. Taxpayer reported the amounts retained in the reserve account as income in the years when such amounts were paid to him by GMAC. (R. 64.)

Taxpayer did not file a declaration of estimated tax for any of the years in controversy. (R. 64.)

The Tax Court affirmed the Commissioner's deficiency determination, holding (1) that the amounts retained in the reserve account were a part of taxpayer's gross income in the years when the amounts were placed in the reserve account; and (2) that the additions to tax determined under Code Section 294 (d) (1) (A) for failure to file declarations of estimated tax and under Code Section 294(d) (2) for substantial underestimation of estimated tax were properly determined by the Commissioner. (R. 64-65.)

² Taxpayer included \$4,462.27 from amounts withheld in the reserve account in his gross income in 1952 and also included the same amount in 1953 income. The Tax Court made adjustment to reduce 1953 income by the duplicated amount. (R. 72.)

SUMMARY OF ARGUMENT

1. The Tax Court correctly held that amounts withheld by GMAC in purchasing conditional sales contracts from the taxpayer, an accrual basis automobile dealer, which amounts were credited to a reserve account in taxpayer's name on the finance company's books, were includible in the taxpayer's gross income for income tax purposes in the years withheld and credited. Since the taxpayer was on the accrual basis, the entire profit to him from the sale of the automobiles was properly includible in his gross income at the time of sale, even though some deferred payments would not be received until a subsequent period, and even though there was a possibility that the purchasers would default. Taxpayer's practice of accruing less than the entire sales price is inconsistent with the accrual method of accounting.

The finance company took no part in the sales, which were solely between the purchaser and the taxpayer. The transaction was complete at the time the down payment was made and the conditional sales contract executed, and at that time the taxpayer had an enforceable right to receive the remainder of the purchase price. The entire profit should be accrued at that time regardless of when received, and no portion of the profit is rendered non-taxable at that time because the contracts were sold to the GMAC under an arrangement by which a percentage of the selling price was retained as security.

There is no merit to taxpayer's argument that the amount which he will receive from the reserve ac-

count is so uncertain that he might never receive anything. Ultimately only two things can happen to the funds in the dealer reserve account, either the amounts will be paid to the taxpayer in cash or they will be used to satisfy taxpayer's other obligations to the finance company. There is no showing that the amounts in the reserve would not be collectible at the appropriate time or that their collection would be improbable.

The sale of the automobiles by the taxpayer to individual purchasers and the sale of the contracts to the finance company were separate transactions, but whether regarded as one or two transactions, in either case the only thing which would prevent the taxpayer from receiving the full sales price would be a purchaser's default, which is not a contingency sufficient to defer the accruing of income that has already been earned.

The Tax Court's decision is fully in accord with decisions of the Supreme Court, of this Court, and of the Tax Court, as well as with rulings of the Commissioner and with consistent administrative practice. It is respectfully urged that the cases of *Johnson v. Commissioner*, 233 F. 2d 952 (C.A. 4th); *Texas Trailercoach, Inc. v. Commissioner*, 251 F. 2d 395 (C.A. 5th); and *West Pontiac, Inc. v. Commissioner* (C.A. 5th), decided February 6, 1958 (1 A.F.T.R. 2d 58-839), were incorrectly decided and that they should not be followed here.

2. The Tax Court properly held that taxpayer was liable in 1951, 1952 and 1953 for penalties for substantial underestimation of estimated tax under Sec-

tion 294(d)(2) of the Internal Revenue Code of 1939. Taxpayer did not file any declarations of estimated tax in the taxable years, and he has not appealed from the addition to tax imposed by Code Section 294(d)(1)(A) for failure to file such declarations. The applicable Treasury Regulations provide that where no declaration is filed the amount of the estimated tax is zero. This provision has been sustained by the Tax Court, and is fully supported by the legislative history of the Code. It has not been shown to be unreasonable or inconsistent with the language of the Code it interprets. Moreover, the provision has been continued in the Regulations without substantial change during frequent reenactment of the Code Section involved, and Congress has never indicated disapproval of it. The Tax Court has repeatedly held that a failure to file a declaration results in a zero amount of estimated tax and that an addition for substantial underestimation may also be imposed if any tax is found to be due. Several District Courts have reached the same conclusion. The Tax Court's decision here is fully in accord with the language of the Code, with its legislative history, and with the applicable Treasury Regulations, all of which show a clear intent that both additions should be applicable for the same taxable year.

ARGUMENT**I**

The Tax Court Correctly Held That Amounts Withheld By GMAC In Purchasing Conditional Sales Contracts From The Taxpayer, An Accrual Basis Automobile Dealer, Which Amounts Were Credited To A Reserve Account In His Name On The Finance Company's Books, Were Includible In Taxpayer's Income In The Years Withheld And Credited

The principal issue in this case is whether the Tax Court erred in holding that the Commissioner correctly included in taxpayer's gross income for 1951, 1952 and 1953 amounts credited to a dealer reserve account in taxpayer's name on the books of GMAC, the finance company to which taxpayer sold conditional sales contracts executed by purchasers of automobiles. Taxpayer contends (Br. 7-16) that these amounts were not includible in gross income at the time credited to the taxpayer by the finance company, and that the amounts should be accrued as income only when received, although taxpayer is on the accrual basis of accounting. (R. 64). We submit that there is no merit to this argument and that the Tax Court correctly sustained the Commissioner's determination.

Taxpayer made automobile sales under conditional sales contracts providing for payment of the purchase price in installments, the "Total Time Price" being computed by subtracting the down payment and/or trade-in, if any, from the "Cash Sale Delivered Price" and adding to this difference the cost of any insurance and finance charges. The down payment

was added to the resulting "Time (Deferred) Balance" to fix the "Total Time Price." (R. 61.)

Inasmuch as taxpayer was on the accrual basis (R. 64), the entire selling price of the automobile was includible in gross income at the time the contract with the purchaser was executed, and the entire profit remaining after the cost of the automobile was deducted was taxable net income in the year of sale. *Spring City Co. v. Commissioner*, 292 U.S. 182; *Shoemaker-Nash, Inc. v. Commissioner*, 41 B.T.A. 417. The entire profit was taxable in the year of sale even though many of the deferred payments would not actually be received until a subsequent year (*Dally v. Commissioner*, 227 F. 2d⁷²⁴ (C.A. 9th), certiorari denied, 351 U.S. 908; *Clark v. Woodward*, 179 F. 2d 176 (C.A. 10)), and even though there was a possibility of default by purchasers of the automobiles (*Spring City Co. v. Commissioner*, 292 U.S. 182).

In *Clark v. Woodward Construction Co.*, 179 F. 2d 176 (C.A. 10th), the taxpayer had done highway construction work for the Highway Commission of Wyoming. After the work was completed and accepted by the Commission, all but 15% of the contract price was paid to the taxpayer in 1942. That 15% was withheld pursuant to a state statute in order to give 40 days notice of final settlement and acceptance of the work to persons who might have claims against the contractor. The court held that the accrual basis taxpayer should have accrued and reported the entire amount of the contract price in 1942 when the liability to it was determined and became fixed. It pointed out that, although any claims made

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In *Clark v. Woodward Construction Co.*, 179 F. 2d 176 (C.A. 10th), the taxpayer had done highway construction work for the Highway Commission of Wyoming. After the work was completed and accepted by the Commission, all but 15% of the contract price was paid to the taxpayer in 1942. That 15% was withheld pursuant to a state statute in order to give 40 days notice of final settlement and acceptance of the work to persons who might have claims against the contractor. The court held that the accrual basis taxpayer should have accrued and reported the entire amount of the contract price in 1942 when the liability to it was determined and became fixed. It pointed out that, although any claims made

by third persons against the contractor would be paid from amounts withheld, any such payment would be paid from withheld money belonging to the taxpayer, and that for such payments the taxpayer could have claimed deductions.

In *Dally v. Commissioner*, 227 F. 2d 724 (C.A. 9th), certiorari denied, 351 U.S. 908, there was a contract between the taxpayer and the Government for the construction of prefabricated housing units, payment to be made on the basis of periodic estimates of completion of work, certified to by the taxpayer and the Government.³ The taxpayer contended that it did not need to accrue the percentage of the contract price allocable to work performed in the taxable year inasmuch as the periodic estimates were not certified to until after the close of the taxable year. In denying taxpayer's contention, this Court stated (p. 497-8):

The facts here bring the case within the principle of *Continental Tie & Lumber Co. v. United States*, 286 U.S. 290, 295, 52 S. Ct. 529, 76 L. Ed. 1111, which holds that income may not be deferred after the right matures, even although the ministerial act of computing the amount occurs in the subsequent year, and this although

³ It should perhaps be mentioned that in that case 10% of the contract price was retained by the Government until final acceptance of all the work under the contract. The amount withheld, however, was not in issue in the appeal, and is in no way analogous to the dealer reserve in issue here, inasmuch as it was agreed by both parties that the right to that 10% had not matured in the taxable year since the work had not been finished and accepted.

the administrative procedure to ascertain the amount to be paid is that of a public commission. * * * [The] mere mechanical act of making out the necessary voucher did not operate to postpone the accrual of the sum which had been earned. *Commissioner of Internal Revenue v. Dumari Textil Co.*, 2 Cir., 142 F. 2d 897, 899-900. Sums payable because earned are not rendered contingent and nonaccrued by the mere fact that some additional acts are necessary in order to make the collection, even if those acts must be performed later by third persons or by the government. *Automobile Ins. Co. v. Commissioner*, 2 Cir., 72 F. 2d 265, 267-268. Thus this court has held that a sum payable under a judgment against the United States is accruable in the year when the judgment becomes final notwithstanding Congress has yet to make the necessary appropriation to enable the judgment creditor to get his money. *H. Liebes & Co. v. Commissioner*, 9 Cir. 90 F. 2d 932, 939.

Because the taxpayer in the instant case was financially unable to hold the conditional sales contracts until maturity and still carry the necessary car inventories, he sold the contracts to GMAC. Each sale, however, was a transaction solely between the purchaser and the taxpayer, in which the finance company took no part. Although taxpayer used the forms of conditional sales contract furnished by GMAC, he had no specific contract with GMAC requiring him to assign any of his contracts to that finance company, or to any other finance company, and he could have held such contracts himself without assignment if he had been able to do so. (R. 33-34, 63.) Each sale

was a transaction solely between the purchaser and the taxpayer. (Ex. 5-E; R. 39.) At the time the taxpayer and the purchaser agreed on the selling price and the taxpayer received the down payment, together with the conditional sales contract for the remainder of the selling price plus finance charges, insurance, etc., the transaction was complete and the taxpayer had the right to receive the remainder of the purchase price.

Since the taxpayer used the accrual method of accounting, his entire profit from the sale should be reported when it accrued, regardless of when received. Taxpayer, however, confuses the time his enforceable right to the sales price of the automobile arose under the purchaser's agreement to buy in the taxable years involved with a later date when he would receive the entire sales price. The Commissioner contends that no portion of the profit on the sale of an automobile is rendered currently non-taxable because the taxpayer sold the contracts under an agreement by which a percentage of the selling price was retained as security by the finance company. The contracts were sold for amounts equal to the unpaid balance on the sales price. (R. 63.)

When a contract was sold the taxpayer endorsed it to the finance company guaranteeing payment of the full amount remaining unpaid. The amounts withheld and credited by the finance company to the dealer reserve account were at least 5% of the outstanding balances of the contracts assigned to GMAC. The amounts in the dealer reserve account were held to protect GMAC against any loss arising from the

repossession of any automobile in case of default in payment and also the reserve could be charged, in the event of prepayment by a purchaser, with the amount of the proportionate reduction of finance charges. (R. 63-64.) Taxpayer debited the amounts placed in the reserve by the finance company to an account entitled "Due Finance Company" and credited the amounts to an account called "Reserve for Repossession." (R. 64.) The amounts placed in the reserve were included in taxpayer's income only when they were actually received by him from GMAC. Payments to the taxpayer of amounts in the reserve in excess of approximately 5% of the outstanding balances of the contracts assigned to GMAC were made to taxpayer yearly in January or February. (R. 33.) During 1951 taxpayer failed to include \$3,154.29 retained by GMAC in the reserve account, and also the sum of \$12,953.97 withheld and retained in 1953. (R. 18, 21.)

The amounts set aside to the taxpayer's credit during the taxable years by GMAC were to be used to guarantee losses which might develop at some future time as a result of repossessions, but the record does not show what the incidence of loss on repossessions was during the period.

Taxpayer argues (Br. 10-11) that extreme contingencies governed payment which might prevent the dealer's receipt of any payment of the reserve. This contention is not supported by the record. While it is possible that the taxpayer would not receive cash, the reserve would in all events be used for the benefit of the taxpayer to satisfy future obligations to the

finance company. If the reserve were eliminated in the future its depletion would be due to the satisfaction of the taxpayer's liabilities to the finance company. Taxpayer confuses the arrangement with respect to *payment* of the sums in the reserve account with his absolute fixed right in the taxable years to receive definite sums credited to him at the time of sale and properly accruable at that time. The fact that the amounts in the reserve account were not immediately payable to the taxpayer is of no significance, for the important thing is that he had an enforceable right to the entire sales price of the automobiles sold during the taxable years. There was no uncertainty with respect to the amounts to which taxpayer became entitled in the taxable years. Those amounts were definitely fixed at the time they were credited by GMAC to the reserve account in his name. Only two things could ultimately occur with respect to these funds: either the amounts would be paid to the taxpayer in cash or they would be used to satisfy his other obligations to GMAC. There is no showing whatever that the amounts in the reserve accounts would not be collectible from GMAC at the appropriate time or that collection would be improbable. It thus cannot logically be argued that the reserve might never be realized by the taxpayer.

Contrary to taxpayer's contention (Br. 8-9), the sale of an automobile by the taxpayer to an individual purchaser and the sale of the contract to the finance company were two separate transactions. See *Raybestos-Manhattan Co. v. United States*, 296 U.S. 60. However, whether the sale of an automobile and the

sale of the contract were one or two transactions is really immaterial, for in either case the only thing that would prevent the taxpayer from receiving the full sales price would be the default of a purchaser which, as pointed out earlier in this brief, is not a contingency sufficient to defer the accruing of income that has already been earned. *Spring City Co. v. Commissioner*, 292 U.S. 182.

An analogous situation exists in instances where deductions have been held allowable as accrued expenses in the taxable year when all facts have occurred which determine that the taxpayer has incurred a liability. See *Pacific Grape Products Co. v. Commissioner*, 219 F. 2d 862 (C.A. 9th); *Ohmer Register Co. v. Commissioner*, 131 F. 2d 682 (C.A. 6th); *Air-Way Electric Appliance Corp. v. Guitteau*, 123 F. 2d 20 (C.A. 6th).

The Commissioner has consistently ruled that amounts withheld by finance companies to cover possible losses on notes purchased from dealers in trailers and automobiles constitute income to dealers using the accrual method of accounting at the time the credit is made in favor of the dealer by the finance company, even though the dealer is not immediately or even currently able to draw on the entire reserve. See Rev. Rul. 57-2, Appendix, *infra*, reaffirming the earlier ruling, G.C.M. 9571, X-2 Cum. Bull. 153 (1931). This recent ruling holds that the time for accrual of the reserve is not affected by the fact that some part or all of the reserve may be used to cover worthless notes in the future, since whenever notes become worthless the dealer's bad debt

deduction must be separately established under 1954 Code Section 166 relating to bad debts. There is no remote contingency in the present case which would distinguish it from the facts involved in that ruling. The ruling makes clear (p. 155) that a remote contingency which cannot reasonably be accrued for income tax purposes "must, however, be something more than the mere possibility of the debtor not satisfying his indebtedness." Again it states (p. 155):

There is always a possibility, where the relationship of debtor and creditor exists, that the debtor may not pay, due to financial reverses, but if the possibility of such failure to pay is accepted as a reason for not accruing an item of income the whole theory of the accrual method of accounting must fall where commercial transactions are concerned.

The instant case does not involve the question whether taxpayer may establish a reserve for bad debts. Although Section 23(k) of the Internal Revenue Code of 1939, Appendix, *infra*, permits the deduction of either specific debts which become worthless within the taxable year or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts, the taxpayer chose to use the specific debt charge-off method for bad debt (Exs. 1-A, 2-B, 3-C; R. 5, 37, 64) and should not be allowed any further deduction.

The Board of Tax Appeals relied on G.C.M. 9571, *supra*, in *Shocmaker-Nash, Inc. v. Commissioner*, 41 B.T.A. 417, where an accrual basis taxpayer sold notes received in partial payment on automobiles to

certain finance companies. Each company withheld a portion of the purchase price of the notes and credited it to the dealer on its books in a reserve account. As in the instant proceeding, the reserve was held as partial security for the dealer's obligations to the finance company. The agreement between Shoemaker-Nash, Inc., and the General Contract Purchase Corporation provided that, at any time any obligation of the dealer which was covered by the reserve became due and unpaid, the finance company could apply the reserve against the obligation. That provision is similar in all material respect to the agreement with the finance company in the instant proceeding. The Board of Tax Appeals there held that the taxpayer should report as income all amounts credited to the reserve accounts each year even though nothing was released from the accounts during the year. That case has been followed in many Tax Court decisions, which uniformly hold that dealer reserves belong absolutely to the dealer, and that provisions with respect to the *payment* of the reserves cannot serve to take from income amounts credited which would normally be determinative of his tax liability where a taxpayer is on the accrual basis. See *Kilborn v. Commissioner*, 29 T.C. 14, pending on appeal to the Fifth Circuit; *Evans Motor Co. v. Commissioner*, 29 T.C. No. 62; *Baird v. Commissioner*, decided October 9, 1957 (1957 P-H T.C. Memorandum Decisions, par. 57, 192), pending on appeal to the Seventh Circuit; *Schaeffer v. Commissioner*, decided April 30, 1957 (1957 P-H T.C. Memorandum Decisions, par. 57,068) pending on appeal

to the Sixth Circuit; *Glover v. Commissioner*, decided March 18, 1957 (1957 P-H T.C. Memorandum Decisions, par. 57,045), pending on appeal to the Eighth Circuit; *West Pontiac, Inc. v. Commissioner*, 27 T.C. 749, reversed, February 6, 1958 (C.A. 5th) (1 A.F.T.R. 2d 58-837); *Texas Trailercoach, Inc. v. Commissioner*, 27 T.C. 575, reversed, 251 F. 2d 395 (C.A. 5th); *Brodsky v. Commissioner*, 27 T.C. 216; *Wm. Koch Motors, Inc. v. Commissioner*, decided December 30, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,334); *Central Motors, Inc. v. Commissioner*, decided August 12, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,228); *Ray Woods Used Cars, Inc. v. Commissioner*, decided September 30, 1952 (1952 P-H T.C. Memorandum Decisions, par. 52,290); *Town Motors, Inc. v. Commissioner*, decided July 24, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,173); *Royal Motors, Inc. v. Commissioner*, decided July 12, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,255); *Colorado Motor Car Co. v. Commissioner*, decided March 25, 1940 (1940 P-H T.C. Memorandum Decisions, par. 40,178).

The case of *Keasbey & Mattison Co. v. United States*, 141 F. 2d 163 (C.A. 3d), on which taxpayer relies (Br. 11-12), is distinguishable on its facts. See *Evans Motor Co. v. Commissioner*, 29 T.C. No. 62. In that case a taxpayer sold asbestos products manufactured by it to dealers and distributors, who sold to retailers or applicators, who in turn sold to home owners. Upon the termination of Federal Housing Authority financing in 1936, with respect to which

F.H.A. had guaranteed to the applicators the notes given in payment by the home owners, the taxpayer contracted with a finance company (p. 164) "to discount, for *applicators*," (italics supplied) notes of home owning purchasers of the taxpayer's products for which service the finance company was to make a charge of seven per cent of the amount of the notes so discounted. Five of the seven per cent charge was to go to the finance company as compensation for its financing services, and the balance (two per cent) was to be placed in a reserve fund by the finance company to liquidate possible losses from uncollectible notes. The contract further provided that whenever the total reserve fund should exceed ten per cent of the unpaid balance of the outstanding discounted notes such excess should be paid to the taxpayer at its option and upon termination of the agreement any balance remaining in the reserve fund was to be paid to the taxpayer. The contract also contained an express assumption of liability on the part of the taxpayer to the finance company for unpaid notes, in addition to the protection afforded by the reserve, up to ten per cent of the aggregate amounts of notes discounted. It is thus clear that the taxpayer in that case was not selling notes to the finance company as in *Shoemaker-Nash Inc. v. Commissioner*, 41 B.T.A. 417, and as in the instant case, but the finance company was merely discounting notes for the retailers or *applicators* of taxpayer's products. Since a materially different factual situation was involved, it is unnecessary to discuss here whether the decision of the Third Circuit was correct.

A more recent Third Circuit case is believed to be more in point here. In *Wayne Title & Trust Co. v. Commissioner*, 195 F. 2d 401, the court held that title insurance premiums are fully earned when received and that this characteristic is not destroyed by the requirement of Pennsylvania law that a portion of such premiums or an equivalent sum be set aside and retained in a reinsurance reserve fund. The rationale of that case is analogous to and in accord with the Tax Court's decision here. Since it is a later decision than the *Keasbey & Mattison Co.* case, it should be given more weight than the earlier decision of that Circuit.

Another analogous situation was presented in *Whitney Corp. v. Commissioner*, 105 F. 2d 438 (C.A. 8th), where during a reorganization there was a transfer of assets of a subsidiary corporation to a new corporation in exchange for another corporation's preferred stock, most of which was deposited with a trust company in escrow as a guaranty of stated minimum earnings of the new corporation. The court there held that the profit from the transfer was taxable in the year during which the stock was issued and deposited in escrow, at which time the rights of the parties were definitely fixed and ascertainable, not in the year when the escrow period ended. See also *Bonham v. Commissioner*, 89 F. 2d 725 (C.A. 8th).

Again, the case of *Commissioner v. Cleveland Trinidad Pav. Co.*, 62 F. 2d 85 (C.A. 6th), upon which taxpayer relies (Br. 11), is not in point here. The taxpayer there did not have an unqualified right to receive the full amount of the contract price for paving and maintaining pavements, but the municipalities

were to retain a portion to guarantee the maintenance of the pavements for the periods specified. There was no provision that the taxpayer would ultimately receive any portion of the amounts withheld. The court pointed out that the sum withheld for maintenance might be materially reduced in the event of necessary repairs or subsequent disclosure of a failure to comply with specifications. In the instant case, there was no guarantee on the part of the taxpayer to maintain the automobiles after they were sold.

The taxpayer also relies on *Johnson v. Commissioner*, 233 F. 2d 952 (C.A. 4th) (Br. 12); *Texas Trailercoach, Inc. v. Commissioner*, 251 F. 2d 395 (C.A. 5th) (Br. 13-15); and *West Pontiac, Inc. v. Commissioner*, (C.A. 5th), decided February 6, 1958 (1 A.F.T.R. 2d 58-837) (Br. 15). It is the Commissioner's position that these cases were wrongly decided, and he respectfully urges that they should not be followed as a precedent here.

It is submitted, therefore, on the basis of the record, and well-settled principles of accrual accounting the Tax Court correctly held that the amounts credited to the taxpayer in the dealer reserve account in the taxable years should properly be accrued as income in those years.

II

The Tax Court Properly Held That Taxpayer Was Subject To Penalties For Substantial Underestimation Of Estimated Tax Under Section 294(d)(2) Of The Internal Revenue Code Of 1939

Taxpayer did not file declarations of estimated tax for the taxable years 1951, 1952 and 1953. (R. 64.)

The Commissioner asserted penalties or additions to tax under Section 294(d)(1)(A), Appendix, *infra*, for failure to file declarations of estimated tax, and also under Section 294(d)(2), Appendix, *infra*, for substantial underestimation of estimated tax. (R. 17.) The Tax Court sustained the imposition of both penalties. (R. 67-68.) Taxpayer has appealed only with respect to the addition to tax imposed by Section 294(d)(2). (R. 82-83; Br. 3, 16-20.)

To Section 294(a), were added, by Section 5(b) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, subsections (3), (4) and (5), which contain three sanctions designed to give force to the obligation there imposed on taxpayers for the first time to make declarations and payments of estimated taxes. These are additions to tax in the case of (3) failure to file timely a declaration of estimated tax; (4) failure to pay installments of estimated tax, and (5) substantial underestimation of the estimated tax.

Section 294(d)(2) provides that "If 80 per centum of the tax * * * exceeds the estimated tax * * *, there shall be added to the tax an amount * * * equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax * * *." Taxpayer argues (Br. 16-20) that because he failed to file a declaration of estimated tax he cannot be said to have underestimated it.

However, Treasury Regulations 118, Section 39.294-1(b)(3)(a) Appendix, *infra*, provides that "In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this

provision is *zero*.”⁴ (Italics supplied.)

Treasury Regulations must be sustained unless unreasonable and plainly inconsistent with the statute which they interpret; they are not to be overruled except for weighty reasons. *Commissioner v. South Texas Co.*, 333 U.S. 496, 501, rehearing denied, 334 U.S. 813; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378; *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 103; *Brewster v. Gage*, 280 U.S. 327.

The leading Tax Court decision, *Fuller v. Commissioner*, 20 T.C. 308, affirmed on other issues, 213 F. 2d 102 (C.A. 10th), rejected attack on the above Treasury Regulations in the following language (p. 316):

The petitioners attack the regulation as being void in that it “distorted the will of Congress.” The regulation is couched in the same language used by Congress in its Conference Report on legislation covering this subject and follows the procedure therein prescribed. It therefore appears that the regulation actually reflects, rather than distorts, the will of Congress, and we uphold its validity.

Both the Senate Report and Conference Report (S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1283, 1345); H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56) (1943 Cum. Bull. 1351, 1372) provided as follows:

⁴ The same provision appears in Treasury Regulations 111, Section 29.294-1 (b) (3) applicable to the taxable year 1951.

In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision will be zero.

Moreover, Treasury Regulations "long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering v. Winmill*, 305 U.S. 79, 83; *Gust Glass Co. v. Commissioner*, 204 F. 2d 327 (C.A. 8th). Congress has seen fit substantially to re-enact the sections here involved several times since 1943.⁵ It has in no way indicated disapproval of the Treasury Department's interpretation of the statute as reflected in its Regulations. The re-enactment doctrine should have, therefore, considerable force. *Helvering v. Winmill*, *supra*.

That the additions to tax may be imposed for both failure to file a declaration and for a substantial underestimate in the same taxable year is also shown by the Committee Reports to the 1954 Code. The 1954 Code eliminated the addition to tax for failure to file a declaration (Section 6651(c) (26 U.S.C. 1952 ed., Supp. II, Sec. 6651)) except in the case of wilful

⁵ The following amendments and re-enactments have been made to these provisions without disturbing the regulative provision here in dispute. Section 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21; Section 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; Section 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; Section 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; Section 208(d) (4) Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; Section 221(g), Revenue Act of 1950, c. 991, 64 Stat. 906; and Section 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452.

failure (Section 7203 (26 U.S.C. 1952 ed., Supp. II, Sec. 7203)). The 1954 Code combined the three additions into a single one for underpayment of the estimated tax and based the addition upon six per cent per annum of the amount of the underpayment for the period of the underpayment. Section 6654 of the 1954 Code (26 U.S.C. 1952 ed., Supp. II, Sec. 6654).

In explaining this change the Committee Reports point out that under the 1939 Code additions to tax for failure to file a declaration and for a substantial underestimate would both apply for the same taxable year, stating (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 100 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127)):

Additional charges are imposed under the present law for failure to file a declaration or make a payment of the estimated tax or for substantial underestimates of tax liability. These charges may be severe. For failure to file a declaration or to pay an installment of the estimated tax, the total charge may be as high as 9 percent of the unpaid installment. For a substantial underestimate of tax, that is, an estimated tax which is less than 80 percent of the actual tax liability for the year ($66\frac{2}{3}$ per cent in the case of farmers), a charge of 6 percent of the amount by which the final tax liability exceeds the estimated tax may be imposed. This charge and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due.

See also S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769).

In conformity with the above legislative history and Regulations, the Tax Court has repeatedly held that a failure to file a declaration results in a zero amount of estimated tax, and that an addition for a substantial underestimate may also be imposed if any tax is found to be due. Following are a few of the Tax Court decisions: *Fuller v. Commissioner*, 20 T.C. 308, affirmed on other grounds, 213 F. 2d 102 (C.A. 10th); *Baumgardner v. Commissioner*, decided May 9, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56, 112), affirmed on other grounds, 251 F. 2d 311 (C.A. 9th); *Clayton v. Commissioner*, decided January 25, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,021), affirmed, 245 F. 2d 238 (C.A. 6th); *Fogel v. Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,185), affirmed, *per curiam*, 237 F. 2d 917 (C.A. 6th); *Acker v. Commissioner*, decided January 28, 1957 (1957 P-H T.C. Memorandum Decisions, par. 57,017), pending on appeal to the Sixth Circuit; *Abbott v. Commissioner*, 28 T.C. 798, pending on appeal to the Third Circuit; *Patchen v. Commissioner*, 27 T.C. 592, pending on appeal to the Fifth Circuit; *Kaltreider v. Commissioner*, 28 T.C. 121, pending on appeal on other issues in the Third Circuit; *Beacham v. Commissioner*, 28 T.C. 598, pending on appeal on other issues in the Fifth Circuit.

Several District Courts have reached the same conclusion as the Tax Court. *Erwin v. Granquist* (Ore.), decided May 10, 1957 P-H, par. 72,786), affirmed, *per curiam*, February 13, 1958 (C.A. 9th) (1 A.F. T.R. 2d 58-978), taxpayer's petition for certiorari

pending; *Palmisano v. United States* (E.D. La.), decided January 22, 1958 (1 A.F.T.R. 2d 58-934), pending on appeal to the Fifth Circuit; *Farrow v. United States*, 150 F. Supp. 581 (S.D. Cal.); *Peterson v. United States*, 141 F. Supp. 382 (S.D. Tex.). It is true, as taxpayer notes (Br. 18-19), that a few District Courts have held that the addition to tax under Section 294(d)(2) cannot be applied where no declaration of estimated tax was filed. These cases stem from *United States v. Ridley*, 120 F. Supp. 530 (N.D. Ga.), decided in 1954. See also *Barnwell v. United States* (E.D. S.C.), decided February 4, 1958 (1 A.F.T.R. 2d 58-995); *Jones v. Wood*, 151 F. Supp. 678 (Ariz.); *Stenzel v. United States*, 150 F. Supp. 364 (N.D. Cal.); *Powell v. Granquist*, 146 F. Supp. 308 (Ore.), affirmed on another issue, 252 F. 2d 56 (C.A. 9th); *Owen v. United States*, 134 F. Supp. 31 (Nebr.), appeal dismissed, 232 F. 2d 894 (C.A. 8th).

The Revenue Service has announced it will adhere to *Fuller v. Commissioner*, *supra*, and will not follow *United States v. Ridley*, *supra*. Rev. Rul. 55-224, 1955-1 Cum. Bull. 414.

The District Court in *Ridley*, *supra*, reasoned that both sanctions could not stand and therefore that the lesser (San^Ection 294(d)(2)) should fall on the theory that no estimate had been made. The results that may flow from the *Ridley* decision are well illustrated by *Jones v. Wood*, 151 F. Supp. 678 (Ariz.). There taxpayer filed no declarations of estimated tax. The District Court first held, following *Ridley*, that the impost under Section 294(d)(2) could not stand; then it held the addition to tax under Section 294(d)

(1)(A) was excused on the grounds of reasonable cause. Thus, taxpayer paid nothing for failing to obey the law and retaining use of the money.

If Congress had not intended both sections to apply it could easily have so provided. The addition to tax for failure to pay, as provided in Section 294(d)(1)(B), is expressly limited to cases where a declaration of estimated tax was filed. Section 294(d)(2) has no similar provision making the penalties interdependent.

Section 294(d)(1)(A), which imposes an addition to tax for the failure to file, may not always apply as *Jones v. Wood*, *supra*, illustrates, for it may be excused on a showing of "reasonable cause." The Tax Court found reasonable cause lacking in the instant case. (R. 65.) Section 294(d)(2), however, contains no exculpatory language, which leads to the conclusion that Congress intended it to apply automatically whenever taxpayers failed by 20% or more to meet the statute's obligation. *Smith v. Commissioner*, 20 T.C. 663. It is not sensible to penalize the person who tries but misses by 20% regardless of reason (*Smith v. Commissioner*, *supra*), but to let go altogether the person who does not even file a declaration, if he had an excuse for his failure, as the court did in *Jones v. Wood*. Cf. *United States v. Koppers Co.*, 348 U.S. 254, 263.

We submit that the Tax Court and District Court decisions which apply both additions are clearly correct, and that they are fully in accord with the language of Section 294(d)(1)(A) and (d)(2), with the legislative history of the section's enactment and

with the applicable Treasury Regulations, all of which show a clear intent that both additions should be applicable for the same taxable year.

CONCLUSION

For the reasons stated, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service, or whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(k) [as amended by Sec. 113(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Bad Debts*.—

(1) *General rule*.—Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts

* * *

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period

(fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such methods as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 42 [as amended by Sec. 114, Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule*.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 42.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * *

(d) [as added by Sec. 118(a), Revenue Act of 1943, *supra*] *Estimated Tax*.—

(1) [as amended by Sec. 13(b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Failure to file declaration or pay installment of estimated tax*.—

(A) *Failure to File Declaration.*—

In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 1 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

* * * *

(2) [as amended by Sec. 6(b)(8) of the Individual Income Tax Act of 1944, *supra*] *Substantial underestimate of estimated tax*.—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or 66 $\frac{2}{3}$ per centum of such tax so determined in the case of such farm

ers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declarations for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year.

* * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 118,⁶ promulgated under the Internal Revenue Code of 1939:

⁶ Treasury Regulations 111, Sections 29.41-1, 29.41-2 and 29.294(b) (3) (4), applicable to the year 1951, are substantially similar to the quoted sections from Treasury Regulations 118.

Sec. 39.41-1 *Computation of net income.* Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 39.42-1 to 39.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 39.41-2 *Bases of computation and change in accounting Methods.*—(a) Approved standard method of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistence. See section 48 for definitions of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly unless in order clearly to r

fect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 39.42-2 and 39.43-3.) On the other hand, appreciation in value or property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. (But see section 39.22(c)-5.)

* * * *

Sec. 39.294-1 *Additions to the tax.*—

* * * *

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax*—

* * * *

(3) *Substantial understatement of estimated tax.* (1) Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer. Except as hereinafter provided—

(a) In the case of individuals, other than those exercising the election under section 60(a), relating to farmers, an addition to the tax under section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the

amount of the credit for taxes withheld at source on wages under section 35 and the credit under section 32) is less than 80 percent of the tax imposed by chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * *

Rev. Rul. 57-2, 1957-1 Cum. Bull. 17:

Rev. Rul. 57-2

Amounts withheld by banks or finance companies to cover possible losses on notes purchased from dealers constitute income to dealers employing accrual method of accounting, to the extent of their interest therein at the time the amounts are recorded on the books of the bank or finance company as a liability to the dealer, regardless of whether charges for worthless notes are also made to the account pursuant to an agreement between the parties. Losses sustained on worthless notes shall be separately established by the dealer as required by section 166 of the Internal Revenue Code of 1954.

The Internal Revenue Service has been requested to state its position with respect to the treatment, for Federal income tax purposes, of amounts withheld by banks and finance companies to cover possible losses on notes purchased from automobile or other dealers employing the accrual method of accounting, and which are recorded on the books of the bank or finance company as a liability of the bank or finance company to the dealer.

The steps generally involved in transactions concerning automobile dealers are as follows: When a car is purchased on credit from a dealer, the purchaser makes a down payment, either in the form of cash or by turning in another car at an agreed value, the balance being satisfied by the purchaser's promissory note and a supporting conditional sales contract. The face amount of the note reflects two elements—the balance of what would be the purchase price of the car, if bought for cash, and a finance charge. As between the purchaser and the dealer, the transaction is closed and completed at this point with the attendant tax consequences to the dealer.

It is then common practice for the dealer to sell or discount the purchaser's note and sales contract to some financial institution. The finance company or bank acquires the note at a value somewhat less than its face value, the difference representing a charge for its service. Simultaneously, either cash or unrestricted credit is given to the dealer to the extent of the amount reflected in the face value of the note. That corresponds to the unpaid balance of the cash retail price of the car. The difference between the face value of the note and the sum of the finance company's charge and its credit or immediate payment to the dealer (representing part of the finance charge previously mentioned) is then credited on the books of the finance company as a liability of the finance company to the dealer. The accumulation of these credits is generally known as a "dealers reserve" and is the specific object of the present consideration.

Settlement of the liability represented by the reserve is subject to agreement between the particular dealer and the financial institution involved. In some instances, the agreement does not contemplate the charging of any items against the reserve account,

while in others the account reflects a running record of various transactions between the parties, that is, both credits and charges are entered, depending upon the nature of the item. Thus, in certain instances, the dealer and the finance company may agree that notes purchased or discounted are to be charged to the reserve account in the event they become worthless.

With regard to those instances where losses incurred by a finance company on the notes purchased from automobile dealers may not be charged against the reserve, the credits to the reserve, by the finance company in favor of a dealer who employs the accrual method of accounting constitute income to the dealer at the time such credit is made, even though the dealer is not immediately or even currently able to draw on the entire reserve. See *G. C. M.* 9571, *C. B. X* 2, 153 (1931), and *Shoemaker-Nash, Inc. v. Commissioner*, 41 B. T. A. 417. The principles involved in the purchase of notes from automobile dealers by banks or finance companies as described above are equally applicable where notes are purchased, under similar conditions, from dealers in items other than automobiles.

Where a dealer's reserve is in the nature of a running account, the charging thereto of worthless notes pursuant to agreement between the parties has no bearing upon the fact that taxable income has been received by the dealer, or upon the time of its realization as otherwise evidenced by the credits to such reserve.

Accordingly, it is held that credits to such reserve in the case of a dealer employing the accrual method of accounting, constitute income to the dealer at the time such credits are made regardless of whether changes to the account for worthless notes are also made pursuant to an agreement between the parties.

Losses sustained on worthless notes are to be separately established by the dealer as required by the provisions of section 166 of the Internal Revenue Code of 1954 relating to bad debts.

In arriving at these conclusions, consideration has been given the case of *Blaine Johnson et al v. United States*, 233 Fed. (2d) 952. See also, *Albert M. Brodsky, et us. v. Commissioner*, 27 T.C. No. 23.

United States Court of Appeals
For the Ninth Circuit

O. H. BENGSTON, as Administrator of the Estate of
Phinice Van Pelt, deceased, *Appellant*,

VS.

ANDREW NESHEIM, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF OF APPELLANT

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United States Court of Appeals

For the Ninth Circuit

| | |
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| O. H. BENGSTON, as Administrator of the Estate of Phinice Van Pelt, Deceased, | } No. 15822 |
| <i>Appellant,</i> | |
| vs. | |
| ANDREW NESHEIM, | <i>Appellee.</i> |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

I.

JURISDICTION

This action is one for wrongful death in which appellant claims jurisdiction under 28 U.S.C.A. §1332(a) (1) which provides:

“The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs and is between:

“(1) citizens of different States.”

The jurisdictional facts are contained in Paragraphs I and II of plaintiff's complaint. Paragraph I provides in effect that the plaintiff brings this action in his capacity as Administrator of the Estate of Phinice Van Pelt; that plaintiff is a resident of Jackson County,

State of Oregon and that Phinice Van Pelt during his lifetime was a resident of Curry County in the State of Oregon and that the defendant is a resident of the City of Edmonds in the County of Snohomish, State of Washington, and therefore a diversity of citizenship exists between the parties (Tr. 1). Paragraph II provides in effect that this is a civil action to recover damages and that the amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs and that in fact judgment is demanded in the sum of \$20,000.00 (Tr. 1-2).

II.

STATEMENT OF THE CASE

There is but one question present in this appeal and we believe that it is one of first impression. The question is, whether or not the limitational period contained in the foreign wrongful death statute is tolled by the fact that the defendant removed himself to a jurisdiction in which the tolling provision for removal to or from that State applies to a wrongful death action. The facts essential to the determination of the above question are not in dispute. The facts show that on or about January 17, 1955, Phinice Van Pelt was drowned in the Chetko River in the State of Oregon (Tr. 11), that approximately two years and three weeks after the death of the said Phinice Van Pelt, plaintiff, his administrator, commenced this action against the defendant, in the United States District Court for the Western District of Washington alleging the negligence of the said defendant and that said negligence was the proximate cause of the death of the said Phinice Van Pelt (Tr.

11). At all times pertinent to this action there were two statutes in full force and effect in the State of Oregon (Tr. 11-12), the two statutes being:

“O.R.S. 30.020. *Action by Personal Representative for Wrongful Death.*

“When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the surviving spouse and dependents, and in case there is no surviving spouse or dependent, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

“O.R.S. 12.150. *Suspension of Running of Statute by absence or concealment.* If, when a cause of action accrues against any person, he is out of the state or concealed therein, such action may be commenced within the applicable period of limitation in this chapter after his return into the state, or the time of his concealment; and if, after a cause of action has accrued against a person, he shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.”

Also in full force and effect in the State of Washington was (Tr. 13):

“R.C.W. 4.16.180. *Statute Tolloed by Absence from State, Concealment, etc.*

“If the cause of action shall accrue against any person who is a non-resident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action.”

Finally there is the fact that the defendant departed from the State of Oregon to the State of Washington at a time less than two years before plaintiff commenced this action (Tr. 12). On September 19, 1957, the defendant moved for summary judgment under Rule 56(b) F.R.C.P. (Tr. 8-10). The court granted the motion for summary judgment in an order entered on September 27, 1957 (Tr. 14-16). The plaintiff appellant contends that the limitational period is tolled by the defendant's removal and therefore brings this appeal.

III.

ASSIGNMENT OF ERRORS

The appellant respectfully submits that the United States District Court for the Western District of Washington, Northern Division, committed the following errors:

1. The court erred in granting defendant's motion for summary judgment.
2. The court erred in decreeing that plaintiff take nothing by his complaint.
3. The court erred in denying plaintiff his right to trial by jury on an issue of fact.

IV.

ARGUMENT

A. Introduction

The determination of the question before the court rests on the law of conflicts, a field in which general principles and public policy are the controlling factors. Insofar as this case is concerned the most recognized principle is that statutes of limitation are a matter of procedure and are therefore governed under the laws of the forum. 11 Am. Jur. Conflicts p. 505. It was in fact conceded by the defendant in argument before the lower court in the argument on the motion for summary judgment. It is conceded by the appellant that, as an exception to the general rule the forum will usually apply the limitational period contained in a foreign wrongful death statute. However, even in that situation the forum will first determine whether or not the limitational period violates the public policy of the forum.

Lewis v. Read Construction Finance Corporation (D.C. Cir. 1949) 177 F.2d 654.

Certainly the criterion of this case will be the public policy of the State of Washington.

As will be discussed in a later section, the law is not clear as to whether or not the Oregon tolling provision, O.R.S. 12.150, is applicable to its wrongful death statute. Appellant's first argument therefore will proceed under the theory that the Oregon tolling provision is not applicable and will show that the Washington court in that event would apply the Washington tolling provision. Appellant's second argument will show that the Washington court would in fact construe the Oregon tolling provision as being applicable to the wrongful death statute.

B. The Law of the State of Washington

1. The Application of the Washington Tolling Provision to a Wrongful Death Action

In Washington the wrongful death statute, R.C.W. 4.20.005 - 020 (the provisions of which are not pertinent to this action) does not contain a limitational period and is therefore governed by the general statute of limitations for personal injuries, R.C.W. 4.16.080.

Dodson v. Continental Can Company (1930)
159 Wash. 589, 294 Pac. 265;

Grant v. Fisher Flouring Mills Company
(1935) 181 Wash. 576, 44 P.2d 193;

Cook v. Clallam County (1947) 27 Wn.2d 793,
180 P.2d 573.

Said statute provides as follows:

R.C.W. 4.16.080. "*Actions limited to three years.*

Within three years: * * *

“(1.) * * *

“(2.) An action for taking, detaining, or injur-

ing personal property, including an action for the specific recovery thereof or for any other injury to the person or rights of another not hereinafter enumerated.”

Although we have found no cases in point in the State of Washington, the arrangement of the statutory provisions manifest that the pertinent tolling provision, R.C.W. 4.16.180, governs all actions under R.C.W. 4.16.080. Under the aforesaid tolling provision a cause of action does not begin to run against a person until his entry into this state.

Krussow v. Strixrud (1949) 33 Wn.2d 287, 205 P.2d 637;

Miller v. Miller (1916) 90 Wash. 333, 156 Pac. 8;

Omaha National Bank v. Lindsay (1906) 41 Wash. 531, 84 Pac. 17.

The law is therefore clear that in Washington a wrongful death action, at least insofar as concerns the statute of limitations, is no different than any other action for personal injuries; and removal or absence of the defendant from the state tolls the running of the limitation period.

2. The Public Policy of the State of Washington

The appellant apprehends that the appellee will argue that the two-year limitation period of the Oregon Wrongful Death Statute is a matter of substantive law and cannot be tolled by the removal of the wrongdoer from the state. Assuming that the foregoing proposition is true, it is appellant's position the public policy of the State of Washington would forbid the application of that rule in this state. The leading Washington

case in this field, and one that is pertinent in view of the fact that it discusses the Oregon Statute, is *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.2d 288, 118 P.2d 895. In this case the deceased met death in Oregon by electrocution from one of defendant's fallen power lines. His administratrix brought suit under the Oregon wrongful death statute in the State of Washington. One of the defenses argued by the defendant was that the distribution of the funds from a judgment was different than that provided in the Washington Statutes on wrongful death and that therefore the Oregon Wrongful Death Statute should not be enforced in the State of Washington. The court held that this particular distinction would not cause a bar to the action. However, in arriving at this decision the court enunciated the principles applicable to this kind of case. At 11 Wn.2d 300, the court, after announcing the rule that an action based upon a wrongful death statute could be brought in another state even though the statutes of the *lex loci* might be different than those of the *lex fori*, stated:

“There is an exception to this later general rule however which is to the effect that a foreign cause of action will not be enforced where to allow suit thereon would be contrary to the strong public policy of the State in which enforcement is sought.”

The court then went on to state at the bottom of the same page:

“Generally speaking the public policy of a State is to be found in its constitution, its statutes and rules laid down by its court.”

The Washington courts have held that Washington statutes relating to limitations are legislative declarations of public policy. *Arthur and Co. v. Burke* (1915) 83 Wash. 690, 145 Pac. 974, cited with approval in *Walker v. Slig* (1945) 23 Wn.2d 552, 161 P.2d 542. Moreover, the Washington courts have stated that statutes of limitation although not an unconscionable defense are not such a meritorious defense either law or fact should be strained to aid it.

Hein v. Granvelle Farmers Elevator Co.
(1931) 164 Wash. 309, 2 P.2d 741, 78 A.L.R.
631;

Bickwire v. Reard (1951) 37 Wn.2d 748, 226
P.2d 192.

There is one case in which the Washington court presumed that another state had a tolling statute similar to R.C.W. 4.16.180, in order to avoid the bar of the statute of limitations. *Miller v. Miller, supra*.

It is also interesting to note that in the *Richardson* case the defendant excepted to an instruction of the lower court on the presumption of due care of the decedent. In overruling the exception, the Supreme Court stated at 11 Wn.2d 312:

“In discussing the assignment upon which appellants’ present contention is based, we proceed upon the recognized rule that, in suits upon foreign causes of action, all presumptions and inferences of fact, being of a purely procedural character, are governed by the law of the forum.* * * The law of Washington is therefore controlling upon this phase of the case.”

Certainly, the rules and law on the presumption of due care by the decedent affect the substantive rights of a

prospective plaintiff far more frequently than the statute of limitations. However, the Washington court will apply its own procedural rules in determining whether or not the presumption of due care applies in a particular case irrespective of the rules of the *lex loci* and thereby indicates that where a matter is procedurally in the State of Washington it will be applied under the Washington rules of procedure.

From the above it clearly appears that the Washington legislature has decreed that a limitation period on a foreign cause of action shall not begin to run until the person has entered this jurisdiction. The courts of Washington have held that a decree of this nature is a statement of public policy of the state and have themselves not been favorable to an interpretation which results in a bar through the statute of limitations. Furthermore, the Washington court is jealous of applying its own procedural rules. Therefore, conceding for the purposes of argument that respondent's interpretation of the Oregon statute is correct, there can be little doubt that the Washington Supreme Court would hold that interpretation to be invalid in this state.

C. The Application of the Oregon Tolling Statute to the Wrongful Death Statute

The previous argument has proceeded on the theory that the Oregon tolling provision, O.R.S. 12.150 does not apply to the Oregon wrongful death statute, O.R.S. 30.020. By doing so, appellant has not in any way intended to indicate that the defendant's contention in that respect is a correct interpretation of the law of the State of Oregon. As of the writing of this brief a

pellant is aware of no case in the State of Oregon passing upon this point. In the lower court the appellee placed great weight on *Burns v. Whiteside*, 35 Ore. 305, 57 Pac. 637, in which there is language to the effect that the tolling statute only applies to common law actions. Clearly the statement to that effect was pure dictum as the Oregon court eventually held that the plaintiff's cause of action was not barred by the statute of limitations. Moreover, there is nothing in O.R.S. 12.150 to indicate that it should be given such a limited instruction. In *Jameson v. Potts*, 55 Ore. 292, 105 Pac. 93, a case in which the tolling statute was held applicable, there was no limitation placed upon it.

The lower court gave considerable weight to *Laidlow v. Oregon Railroad and Navigation Co.* (9 Cir. 1897) 81 Fed. 876 (Tr. 16). That decision had language to the effect that the two-year limitational period was a matter of substantive law, and no action could be brought thereafter. Again this language was dictum in view of the fact that the court held that the action was not barred. Moreover the decision was long prior to *Erie v. Thompkins* (1938) 304, U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

The most important factor is the fact that this action is brought in the State of Washington, and must be determined under the Washington law with respect to conflict of laws. *Klaxon v. Stenton Electric Co.* (1941) 313 U.S. 487, 61 S.Ct. 1021, 85 L.Ed. 1477. There are a long line of decisions in the State of Washington holding that the party asserting application of a foreign law different from that of the forum has the bur-

den of pleading and proving that law. A few of the more recent cases are as follows:

Allen v. Saccomanno (1952) 40 Wn.2d 283,
242 P.2d 549;

Laughlin v. Marsh (1944) 19 Wn.2d 874, 14
P.2d 549;

Walnut Park Lumber and Coal Co. v. Roan
(1933) 171 Wash. 362, 17 P.2d 896.

Admittedly the Oregon statutes are in effect pleaded and proven since they are made a part of the stipulation, but the non-application of the tolling statute O.R.S. 12.150 to the wrongful death statute O.R.S. 30.020 is not proven; it cannot be, as there are no cases in Oregon deciding the point. In view of this fact it will be presumed that the tolling statute does apply to the wrongful death action, for that is the law of the State of Washington. This proposition is supported by *Miller v. Miller, supra*, in which the court held that it would presume that the departure of the defendant from a sister state would toll the statute of limitation in that sister state. Certainly and in view of the public policy of this state, as previously discussed, Washington courts would require a stronger showing that the tolling provision does not apply to the wrongful death statute.

V.

CONCLUSION

There is but one question presented in this appeal; that is, whether or not the limitation period of two years in the Oregon wrongful death statute was tolled by defendant's removal to the State of Washington at a time less than two years before the commencement of the action. The law in the State of Washington is clear that the departure from this state tolls the statute of limitations as applied to a wrongful death action and that the time will not begin to run until a defendant enters this state. The law on this question in Oregon has never been determined. In the event this court should hold that the tolling provision O.R.S. 12.150 is not applicable to the Oregon wrongful death statute, it is clear that this interpretation would be contrary to the public policy of the State of Washington and, as such, would not be applied by this state's courts. Moreover, if this question were before the Washington courts they would hold that the burden of proving the inapplicability of the Oregon tolling provision to the wrongful death statute is upon the defendant. In view of the fact that there are no decisions to that effect in the State of Oregon, there is an irrebuttable presumption that Oregon's law is the same as that of the State of Washington. Therefore, in either event the action would be tolled by defendant's removal to the State of Washington.

Respectfully submitted,

MICHAEL J. CAFFERTY

JOHN J. KEOUGH

Attorneys for Appellant.

United States Court of Appeals
For the Ninth Circuit

O. H. BENGSTON, as Administrator of the Estate of
PHINICE VAN PELT, Deceased, *Appellant*,

vs.

ANDREW NESHEIM, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

HULLIN & EHRLICHMAN
By JOHN A. ROBERTS, JR.
Attorneys for Appellee

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1000 Second Avenue,
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MU. 2-2852.

No. 15822

United States Court of Appeals
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United States Court of Appeals

For the Ninth Circuit

| | |
|---|-------------|
| O. H. BENGSTON, as Administrator of the Estate of PHINICE VAN PELT, Deceased, <i>Appellant,</i> | } No. 15822 |
| vs. | |
| ANDREW NESHEIM, <i>Appellee.</i> | |

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

I. JURISDICTION

The appellee adopts the statement of jurisdiction contained in the appellant's brief on file herein and in addition represents that under the provisions of Title 28 U.S.C., Section 1291, this Court has authority to review the decision of the District Court.

II. STATEMENT OF FACTS

The admitted facts necessary to a determination of this appeal are enumerated in the District Court's ORDER ON MOTION FOR SUMMARY JUDGMENT (Tr. 14, 15) and are the following:

(1) On January 17, 1955, PHINICE VAN PELT was drowned in the Chetko River in the State of Oregon.

(2) Approximately *two years and three weeks* after the death of said PHINICE VAN PELT, the plaintiff commenced this action against the defendant ANDRE NESHEIM in the United States District Court for the Western District of Washington alleging that negligence of said defendant was the proximate cause of the death of the said PHINICE VAN PELT.

(3) At all times pertinent to this action, there was in full force and effect in the State of Oregon the following statute:

“O.R.S. 30.020. Action by personal representative for wrongful death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and, in case there is no surviving spouse or dependents, then for the estate of the decedent, may maintain an action against the wrongdoer for any injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therefor shall not exceed \$20,000.00 which may include recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

(5) That the defendant departed from the State of Oregon to the State of Washington at a time less than two years before the plaintiff commenced this action.

While the above are considered the essential facts from the appellee's point of view, it is readily admitted that the remaining evidentiary matters referred to in the Appellant's brief under the caption STATEMENT OF THE CASE (Appellant's brief 3, 4) are like

wise before this court as they were before the District Court.

III.

QUESTIONS PRESENTED

(1) Does the Complaint allege a cause of action created by the Oregon Wrongful Death Statute?

(2) Is the existence of the right of action, created by the statute, co-extensive with the two-year limitation period prescribed by the statute?

(3) Within the purview of the Conflict of Laws field, what effect, if any, do the tolling provisions of O.R.S. 12.150 (Tr. 12) and R.C.W. 4.16.180 (Tr. 13) have on the limitation period prescribed in O.R.S. 30.020 (Tr. 6, 11, 15).

IV.

SUMMARY OF ARGUMENT

It cannot be disputed that the appellant's cause of action is one that was unknown to the common law and would not have existed except for the express provisions of the Oregon Wrongful Death Statute. The appellee respectfully submits that the tolling provisions of O.R.S. 12.150 and R.C.W. 4.16.180 have no effect whatever on the two year limitation period prescribed by O.R.S. 30.020 for the reason that the statute creating the right, by its express language, limited the time of existence of the right and as such constitutes an exception to the rules of applicability of general statutes tolling limitation periods. Inasmuch as the plaintiff's Complaint was filed after the running of the period of limitations, it is submitted that the right to bring the action no longer existed and that the order of the Dis-

strict Court dismissing the same was proper and should be affirmed by this Court.

V.

ARGUMENT

The principal legal dispute involved herein whether or not the law of the State of Oregon (lex loci), or the law of the State of Washington (lex fori), relating to statutes of limitation and the timing thereof, should be considered and applied to the instant factual situation.

A. Statutes of Limitation Are Generally Considered to be Procedural, Governed by the Law of the Forum. Limitation Periods Prescribed by Wrongful Death Statutes Are an Exception.

It is accepted as academic and undisputed that the general rule in common law actions is that the foreign jurisdiction will apply the substantive law of the jurisdiction in which the action arose and the procedural law of the forum. It is further undisputed that in the usual common law action, the time in which the cause may be brought is generally regarded as a matter of procedure and, therefore, governed by the law of the forum.

The rule with regard to the procedural aspects of periods of limitation on the right to bring an action is contrary, however, where a statutory enactment creates the right of action unknown to the common law, and includes within its express terms a limitation of time in which to assert the right. In this situation, the law of the forum is not applied for the reason that the limitation period is a condition of the substantive right created by the statute.

(1) An action for wrongful death was unknown to the common law and to the law of the State of Oregon until the legislative enactment of the fore-runner of O.R.S. 30.020. In *Hansen v. Hayes* (1944) 175 Ore. 358, 154 P.(2d) 202, the Oregon court clearly and specifically states that a new legal right, unknown to the common law, was created by the enactment of this section. In *McClagherty v. Rogue River Electric Company* (1914) 73 Ore. 135, 154, 140 Pac. 64, 144 Pac. 569, the Oregon court announced that such statutes creating a liability for causing death, while not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law.

In *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.(2d) 288, 188 P.(2d) 895, relied on by the appellants herein, the Supreme Court of the State of Washington, at page 301 of the decision, noted with interest that the particular portion of the Oregon wrongful death statute being construed in the *Richardson* case had been amended by the Oregon State Legislature. In considering "extensions by implication," it is here noted with considerable interest that the Oregon State Legislature has not seen fit to delete or in any way amend the two year limitation period prescribed by that statute.

(2) Where statutory enactments, such as O.R.S. 30.020, create a cause of action and provide by their terms a limitation of time in which to bring such an action, it is a well defined law that the limitation of time provision is not remedial or procedural but is inescapably welded to the substantive right created by

the statute. Accordingly, after the time has elapsed, the right is gone, or conversely, “the limitation accompanied the obligation everywhere.” The rule of law was first announced in this country in the landmark case, *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358, cited numerous times in all jurisdictions including the State of Oregon which gave rise to the decision in *Laidlow v. Oregon Railway and Navigation Co.* (C.A. 9, 1897) 81 Fed. 876. In construing the Oregon state law, this Court stated that the time for commencement of a wrongful death action is of the essence of the right and the right is lost if the time is disregarded. The doctrine of *Erie v. Thompkins* (1938) 304 U.S. 64, 82 L.Ed. 1188, cited in the appellant’s brief at page 11, is not in conflict with this rule.

(3) The appellant has not and cannot seriously contest the foregoing legal principles and actually concede, that as an exception to the general rule, the forum will usually apply the limitational period contained in the foreign wrongful death statute (Appellant’s brief, 5).

In essence, therefore, the appellant’s sole argument before this Court is that the enforcement of the limitation period contained in the Oregon Wrongful Death Statute would be contrary to the public policy of the State of Washington.

B. The Tolling Provision of O.R.S. 12.150 or R.C.W. 4.16.180 Are Not Applicable to the Two-Year Limitation Prescribed by O.R.S. 30.020.

Before discussing appellant’s contentions in this regard, it should be noted that the entire record of this

cause including the record before this honorable Court contains no scintilla of evidence suggesting concealment or fraud on the part of the defendant. The record demonstrates that after the death of the decedent and before the expiration of two years thereafter, the defendant returned to the State of Washington.

(1) In considering the appellant's proposition that the two-year limitation period was tolled by the defendant's removal from the State of Oregon to the State of Washington, within the purview of the conflict of laws field, it is respectfully submitted that the plaintiff has confused the instant factual situation with that which exists in the usual common law cause of action. If we were here dealing with a common law tort action (such as decedent might have had, for the same acts complained of herein, had he survived) it is entirely probable that the tolling provisions of O.R.S. 12.150 or R.C.W. 4.16.180 might be applicable. However, we are not considering a common law cause of action.

In accordance with the general rule, O.R.S. 30.020 contains its own specific period of limitation, defining the period of time within which the right created by the statute shall exist.

The rule is stated at 16 Am. Jur. 115, Section 171, as follows:

"It is usually held that the provisions contained in a general statute of limitations suspending the operation of the statute of limitations during the absence of non-residence of the defendant from the state is not applicable to an action for wrongful death."

The numerous cases so holding are collected in annotations on the question at 67 A.L.R. 1070 and again at 132 A.L.R. 292. On page 295 of the latter annotation the reason the wrongful death limitation of action period is not tolled by the defendant's absence is stated as follows:

"It is held in most jurisdictions that since a wrongful death statute or a survival statute allowing damages for death creates a right of action which did not exist at common law or permits an action which abated at common law to survive, a provision therein limiting the time within which the action may be brought is technically not a statute of limitations, but is a condition of the right to maintain the action, which must be strictly complied with; and that such a limitation is independent of the general statute of limitations. Accordingly, it is held that, ordinarily, circumstances which by express provision or by implication toll the latter statute will not toll the limitation period in a wrongful death statute or a survival statute allowing damages for death, in the absence of a saving clause in the latter statute."

(2) It is noted that no such savings clause exists in the Oregon Wrongful Death Statute and while there is no case directly in point in that jurisdiction, it is clear that the Oregon courts follow the general rule in this regard. As early as 1899, the Oregon court announced its adherence to the general policy of the law in the case of *Burns v. White Swan Mining Co.*, 35 Ore. 305, 57 Pac. 637. In that decision the court was called upon to construe the application of the tolling provisions of O.R.S. 12.150 to a statute creating a mechanic's lien

which, by its terms, provided a limitation of time within which to assert the right thus created. In construing O.R.S. 12.150, the court announced that the section was intended to apply only to the common law rights of action, and that since a mechanic's lien was unknown at the common law, and of a statutory origin, the general statute of limitations had no application to it.

(4) The appellant apparently relies heavily on the decision in *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.(2d) 288, 118 P.(2d) 895, which was not considered at the District Court level. A study of that decision, from the public policy standpoint, confirms the position taken by the appellee in this matter. In this regard, the following language of the court, found on page 299 of the decision is noted:

“It is the universal rule that the *existence* and *nature* of a cause of action for tort are governed by the law of the place where the alleged wrong was committed (citing authorities).” (emphasis supplied).

VI.

CONCLUSION

Under the Oregon Wrongful Death Statute, this action would have been barred and non-existent, if on the day it was filed in the United States District Court for the Western District of Washington, it had been filed in the courts of the State of Oregon. The general statute providing for the tolling of statutes of limitations in the State of Oregon has no application to the limitation period prescribed by the Oregon Wrongful Death Statute and it would be contrary to the public policy of the

State of Washington to allow the prosecution of a cause of action created by the Oregon law without considering the statute in its entirety, including the limitation on the right thus created. For this reason, the general Washington statute, providing under certain circumstances, for the tolling of Washington State's various statutes of limitation could not apply to the instant action.

Accordingly, the appellee was entitled to the relief granted by the District Court and that Court's Order on Motion for Summary Judgment, signed and entered on September 27, 1957, should be affirmed.

Respectfully submitted,

HULLIN & EHRLICHMAN
By JOHN A. ROBERTS, JR.
Attorneys for Appellee

No. 15822

United States
Court of Appeals
for the Ninth Circuit

O. H. BENGSTON, Administrator of the Estate
of Phinice Van Pelt, deceased, Appellant,

vs.

ANDREW NESHEIM, Appellee.

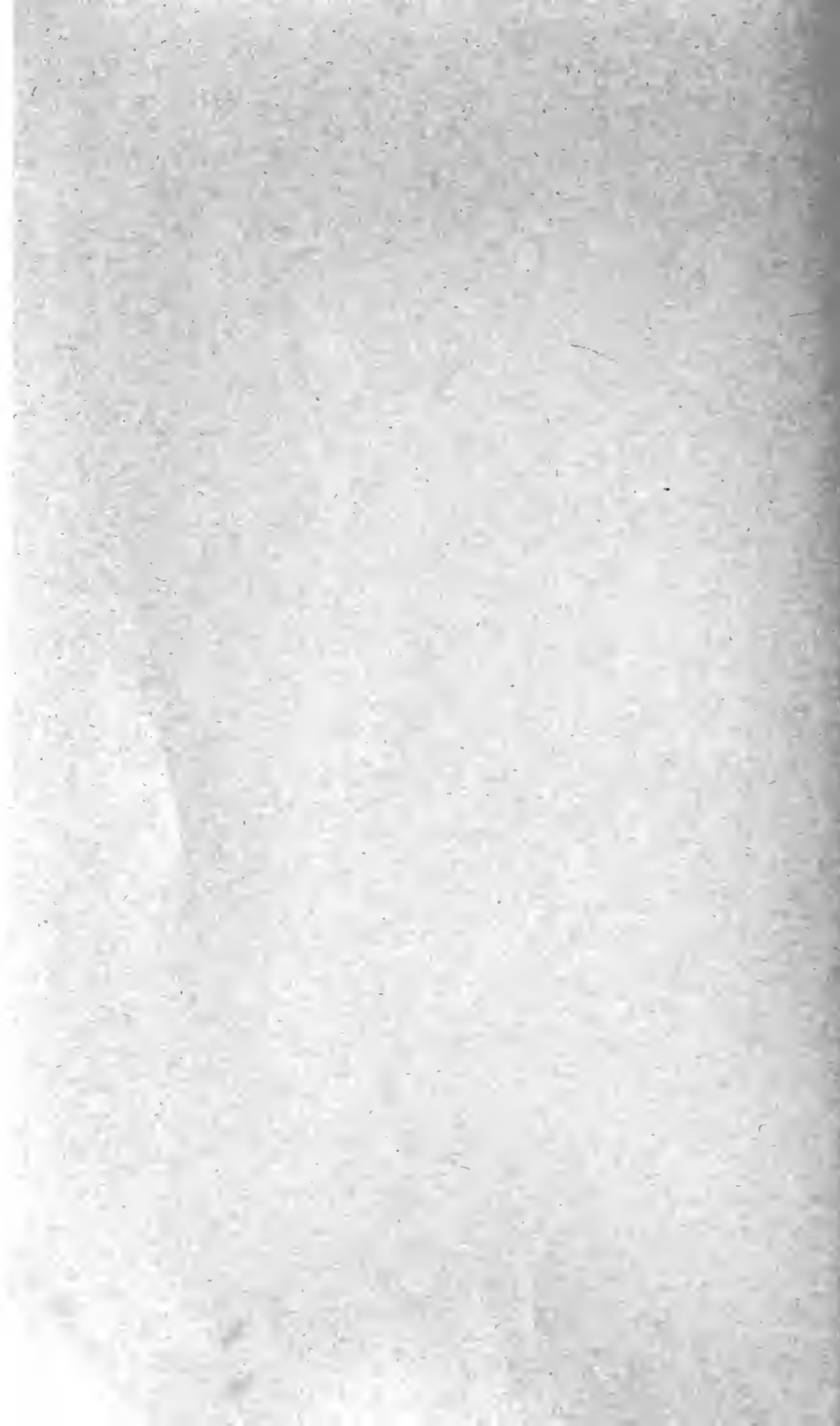
Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

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PAUL P. O'BRIEN, CLERK



No. 15822

United States
Court of Appeals
for the Ninth Circuit

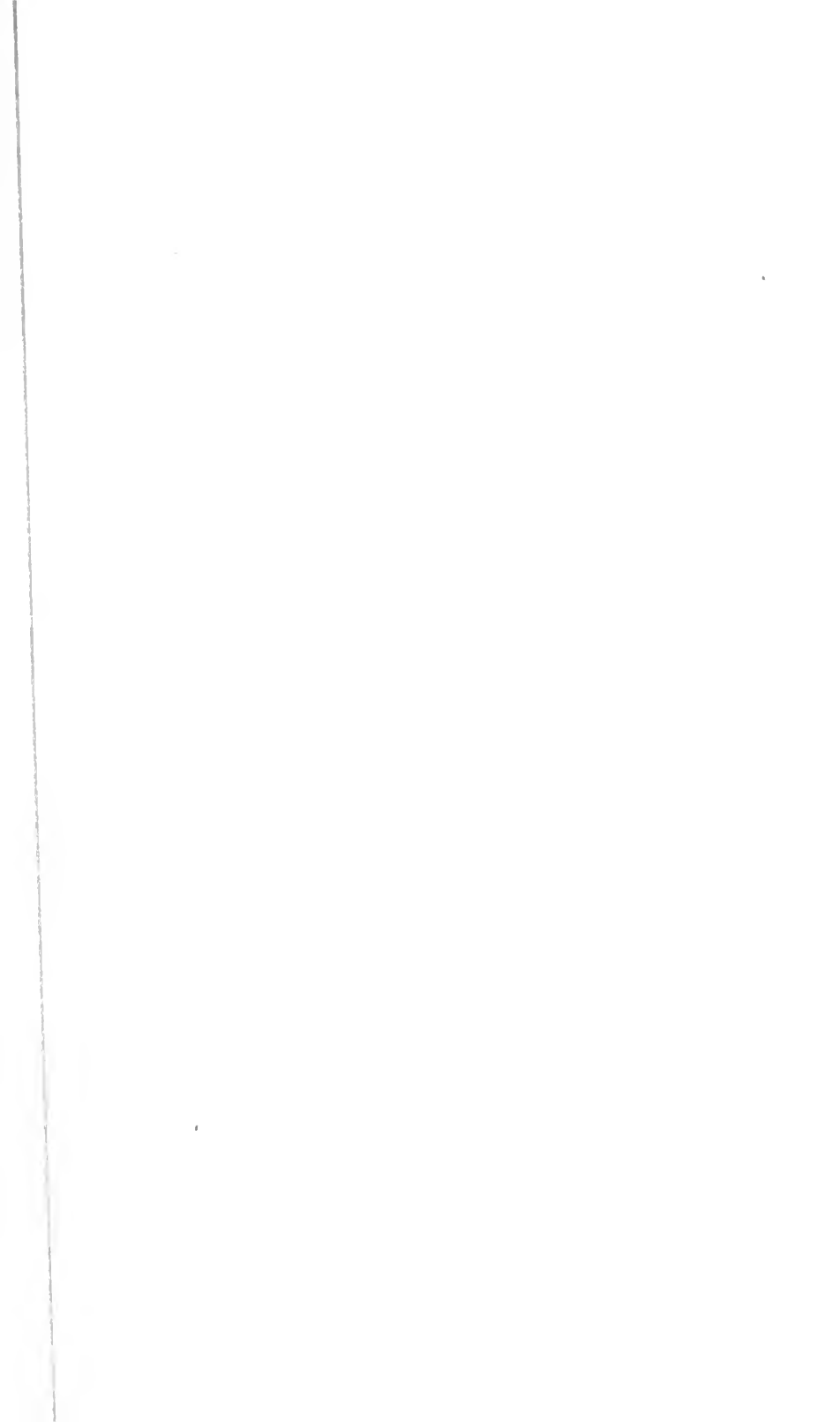
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the United States District Court, Western
District of Washington, Northern Division

Civil No. 4321

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, Deceased, Plaintiff,

vs.

ANDREW NESHEIM, Defendant.

COMPLAINT AT LAW FOR WRONGFUL
DEATH—DEMAND FOR JURY TRIAL

Comes Now plaintiff and alleges:

I.

That plaintiff brings this action in his capacity as administrator of the Estate of Phinice Van Pelt, commenced and pending in the County Court of the State of Oregon for the County of Curry, and that Plaintiff is now a resident of Jackson County of the State of Oregon, and Phinice Van Pelt during his lifetime was a resident of Curry County in the State of Oregon, and the defendant is a resident of City of Edmonds, County of Snohomish, State of Washington, by reason whereof a diversity of citizenship exists between the parties.

II.

That this is a civil action to recover damages for personal injuries and the matter and amount in dispute exceeds the sum of Three Thousand Dollars

(\$3,000.00), exclusive of interest and costs, and judgment is demanded in the sum of Twenty Thousand Dollars (\$20,000.00), general damages.

III.

That on the 17th day of January, 1955, defendant was an independent contractor employed by the Oregon State Highway Department for the purpose of painting the Chetko Bridge at Brookings, Oregon. That on said day, the defendant removed two or more planks on the foot bridge, which goes along the westerly side of said bridge and, thereafter, negligently failed to fasten down said boards in a secure fashion. That on the 17th day of January, 1955, Phinice Van Pelt, while crossing said foot bridge, fell through the hole left by the defendant as the result of removing and failing to fasten said planks securely, and plaintiff's deceased was drowned in the Chetko River.

IV.

That as a proximate result of the negligence of the defendant, plaintiff's deceased was killed. That at and prior to the time of January 17, 1955, Phinice Van Pelt was an able bodied man employed and earning, and capable of earning, substantial sums of money, to wit, Six Thousand Dollars (\$6,000.00) per year. That Phinice Van Pelt left surviving him a widow, but no children, or other heirs.

V.

Plaintiff brings this action as Administrator of the Estate of Phinice Van Pelt, Deceased, for the

benefit of the surviving spouse. That plaintiff, as administrator, has been damaged in the amount of Twenty Thousand Dollars (\$20,000.00).

VI.

Plaintiff seeks a trial by jury.

Wherefore, plaintiff prays for a jury trial and for a judgment against the defendant for Twenty Thousand Dollars (\$20,000.00), general damages, and for costs and disbursements incurred herein.

/s/ JOHN J. KEOUGH,
MICHAEL J. CAFFERTY,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 6, 1957.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant above named and for answer to plaintiff's Complaint alleges as follows:

I.

For the answer to Paragraph I, this defendant alleges that he is without sufficient information to form a belief as to plaintiff's capacity, residence and actions therein alleged, and further, as to decedent's residence, and therefore deny the same, but defendant admits he is a resident of Edmonds, Snohomish County, Washington.

II.

The defendant admits the allegations contained in Paragraph II of the Complaint.

III.

The defendant denies each and every allegation contained in Paragraphs III, IV, and V of plaintiff's complaint.

For Further Answer, And By Way Of First Affirmative Defense, the defendant alleges:

I.

That plaintiff's cause of action, if any, must be based on Section 30.020 of Oregon Revised Statutes.

II.

That this action was not commenced within two years after the death of the decedent and therefore is barred by the limitation of time expressed in said statute.

III.

That Oregon Revised Statute, Section 30.020 provides:

“Oregon Revised Statute—30.020. Action By Personal Representative For Wrongful Death. When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the surviving spouse and dependents, and in case that there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have

maintained an action, had he lived, against the wrongdoer of the injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages cannot exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.”

and was in full force and effect at the time and place of decedent's alleged death.

For Further Answer, And By Way Of Second Affirmative Defense, the defendant alleges:

I.

That if the plaintiff's decedent was killed as in the complaint set forth, such death was proximately caused by the negligence and want of due care of the decedent in failing to exercise his physical senses and prudently conduct himself so as to avoid harm to himself.

Wherefore, having fully answered, defendant prays that plaintiff's Complaint against him be dismissed and that he have and recover a judgment against the plaintiff for his costs and disbursements hereinafter to be taxed.

HULLIN & EHRLICHMAN,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes Now the defendant, above named, by his attorneys of record, and respectfully moves the Court for summary judgment under Rule 56 (b), F.R.C.P., in this cause for the reason that the pleadings, Stipulation and Admissions of Fact on file herein leave no factual issues to be determined upon the trial of the action and that this cause can and should be determined by the Court solely as a matter of law.

This motion is based upon the files and record herein and upon the affidavit of John A. Roberts, Jr., attached hereto, and by this reference made a part hereof.

HULLIN & EHRLICHMAN,

/s/ By JOHN A. ROBERTS, JR.,
Counsel for Defendant.

AFFIDAVIT

State of Washington
County of King—ss.

John A. Roberts, Jr., being first duly sworn, on oath, deposes and says:

That he is associated with the firm of Hullin & Ehrlichman and as such is of counsel for the defendant herein and that he makes this affidavit in support of the foregoing Motion for Summary Judgment;

Your affiant respectfully states that he has carefully reviewed the files and records herein and noted the following pertinent facts which are not in dispute and which, in your affiant's opinion, leave no material issue of fact to be determined upon the trial of this cause. Such facts are as follows:

(1) In plaintiff's complaint it is alleged that the decedent, Phinice Van Pelt, fell from a bridge and drowned in Chetko River; that such fall and resulting drowning was the result of the negligent acts of the defendant; and that all such acts occurred within the territorial jurisdiction of the State of Oregon.

(2) The plaintiff's complaint further alleges that this action was brought by the Administrator of the decedent's estate for the benefit of the surviving spouse.

(3) The defendant's Answer, as a First Affirmative Defense, pleads, in haec verba, Section 30.020 of the Oregon Revised Statutes and further alleges that plaintiff's cause of action, if any, must be based on that section of the Oregon State Law and further alleges that the instant action was not commenced within two years after the death of the decedent and therefore is barred by the limitation of time expressed in said section of the Oregon Revised Statutes.

(4) In the Reply filed herein by the plaintiff, all affirmative matters pleaded in the defendant's First

Affirmative defense are admitted, except that the plaintiff expressly denies that this action is barred by the limitation of time expressed in Section 30.020 of the Oregon Revised Statutes, it being the plaintiff's contention that Washington State law relative to limitation of actions, should control. In addition, the parties have entered into a written Stipulation concerning all facts deemed by your affiant essential to the determination of this cause on questions of law, which Stipulation is, by this reference, incorporated hereby as though fully set forth.

Accordingly, your affiant verily believes that no issue of fact remains to be determined and that in the interest of avoiding costly trial preparation, the issue of law should be tendered to the court to determine whether the law of the State of Oregon or of the State of Washington should be applied in the premises;

Your affiant further states that if this court rules that the law of the State of Oregon controls, then, and in that event the plaintiff's complaint should be dismissed as a matter of law.

/s/ JOHN A. ROBERTS, JR.

Subscribed And Sworn to before me this 13th day of September, 1957.

[Seal] /s/ JAMES M. ANDERSON,
Notary Public in and for the State of Washington,
residing at Seattle, Wash.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 19, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between counsel for the respective parties as to the following facts in this cause and in particular for defendant's motion for summary judgment.

1. That on or about January 17, 1955 Phinice Van Pelt was *drown* in the Chetko River in the State of Oregon.

2. That approximately two (2) years and three (3) weeks after the death of said Phinice Van Pelt, plaintiff commenced action against the defendant Andrew Nesheim in the United States District Court of the Western District of Washington alleging that negligence of said defendant was the proximate cause of the death of said Phinice Van Pelt.

3. That at all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

O.R.S. 30.020

“Action by personal representative for wrongful death.”

“When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent may

maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral burial doctor, hospital and nursing services for the deceased."

4. That at all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

O.R.S. 12.150

"Suspension of running of statute by absence or concealment. If, when a cause of action accrues against any person, he is out of the state or concealed therein, such action may be commenced within the applicable period of limitation in this chapter after his return into the state, or the time of his concealment; and if, after a cause of action has accrued against a person, he shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement or such action."

5. That the defendant departed from the State of Oregon to the State of Washington at a time less than two (2) years before plaintiff commenced this action.

6. That at all times pertinent to this action the

following statute was in full force and effect in the State of Washington:

R.C.W. 4.16.180 Statute Tolled By Absence From State, Concealment, Etc.

“If the cause of action shall accrue against any person who is a non-resident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action. (1927 c 132 §1; Code 1881 §36; 1854 p 364 §10; RRS §168)”

Dated this 13th day of September, 1957.

/s/ JOHN J. KEOUGH,
Of Counsel for Plaintiff.

/s/ JOHN A. ROBERTS, JR.,
HULLIN & EHRLICHMAN,
Counsel for Defendants.

[Endorsed]: Filed Sept. 19, 1957.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4321

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, deceased, Plaintiff,

vs.

ANDREW NESHEIM, Defendant.

ORDER ON MOTION FOR SUMMARY
JUDGMENT

The above-entitled cause came regularly on for hearing before the Court on September 23, 1957, pursuant to notice, on the motion of the defendant for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure.

Mr. John J. Keough appeared on behalf of the plaintiff and Mr. John A. Roberts, Jr., of Hullin & Ehrlichman appeared on behalf of the defendant.

The admitted facts in evidence, necessary to determine this motion are the following:

(1) On January 17, 1955, Phinice Van Pelt was drowned in the Chetko River in the State of Oregon.

(2) Approximately two years and three weeks after the death of said Phinice Van Pelt, the plaintiff commenced this action against the defendant Andrew Nesheim in the United States District Court for the Western District of Washington al-

leging that negligence of the said defendant was the proximate cause of the death of the said Phinice Van Pelt.

(3) At all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

“O.R.S. 30.020. Action By Personal Representative For Wrongful Death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and, in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

(5) That the defendant departed from the State of Oregon to the State of Washington at a time less than two years before the plaintiff commenced this action.

On this showing, the defendant has established from the pleadings and admissions on file herein that the plaintiff has no cause of action and such

showing has not been successfully controverted by plaintiff. The Court reaches this conclusion being of the opinion that under the Oregon Wrongful Death Statute, as indicated by the decision in *Laidlow v. Oregon Railway & Navigation Co.*, (C.A. 9, 1897) 81 Fed. 876, this action would have been barred and non-existent, if on the day it was filed in this Court, it had been filed in the courts of the State of Oregon. In arriving at this conclusion, the Court has further considered the decisions in *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, *Hansen v. Hayes*, (1944) 175 Or. 358, 154 p. (2d) 202, and the editorial comments in 16 Am. Jur., p. 52, Sec. 66 and p. 115, Sec. 170. The Court has further considered and is of the opinion that the general statute, providing under certain circumstances, for the tolling of Washington State's various statutes of limitation could not apply to this action. Accordingly, as a matter of law, the defendant is entitled to judgment on the pleadings in his favor, and for his taxable costs incurred herein in the total amount of \$15.00, Statutory Attorney's fee.

It Is So Ordered.

Done In Open Court this 27th day of September, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.
HULLIN & EHRLICHMAN,
Counsel for Defendant.

Approved as to form by:

/s/ JOHN J. KEOUGH,
Counsel for Plaintiff.

[Endorsed]: Filed and Entered September 27,
1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that O. H. Bengston, plaintiff in the above named action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order Granting Defendant's Motion For Summary Judgment entered in this Court on September 27, 1957.

MICHAEL J. CAFFERTY and
JOHN J. KEOUGH,
/s/ JOHN J. KEOUGH,
Attorneys for plaintiff.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, O. H. Bengtson, the Plaintiff, above named as Principal, and the General Insurance Company of America, a corporation organized under the laws of the State of Washington, and

authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Andrew Nesheim, the Defendant, above named in the just and full sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of October, A.D. 1957.

The Condition of This Obligation Is Such, That,

Whereas, the above named defendant on the 27th day of September, A.D. 1957, in the above entitled action and court, recovered judgment against the plaintiff above named for summary judgment and cost.

And Whereas, the above named Principal has heretofore given due and proper notice that he appeals from said decision and judgment of said Court.

Now, Therefore, if the said Principal, O. H. Bengtson, shall pay to Andrew Nesheim, all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] GENERAL INSURANCE COM-
PANY OF AMERICA,

/s/ By J. S. RADFORD,
Attorney-in-Fact.

Countersigned:

DAWSON & CO., INC.,

/s/ By [Illegible],

Resident Agent, Seattle,
Washington.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith the following original documents in the file dealing with the above action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Feb. 6, 1957.
2. Bond for Costs, Non-Resident Plaintiff, filed Feb. 6, 1957.
3. Summons with Marshal's return thereon, filed Feb. 12, 1957.
4. Appearance of Defendant, filed Feb. 23, 1957.

5. Notice of Expiration of Time to Answer, filed Feb. 27, 1957.
6. Motion to Dismiss, filed Mar. 5, 1957.
7. Note for Motion Docket, filed 3-5-57.
8. Motion for Default, filed Mar. 6, 1957.
9. Motion Plaintiff to Strike defendant's Motion to Dismiss, filed 3-6-57.
10. Note for Motion Docket, filed 3-6-57.
11. Motion for Enlargement of Time to File Motion to Dismiss, filed 3-14-57.
12. Note for Motion Docket, filed 3-14-57.
13. Defendant's Memorandum Opposing Plaintiff's Motion to Strike Defendant's Motion and Plaintiff's Motion for Default, filed 3-14-57.
14. Plaintiff's Additional Memorandum in Opposition to Defendant's Motion to Dismiss and In Support of Plaintiff's Motion to Strike, filed 3-18-57.
15. Answer of Defendant, filed Mar. 28, 1957.
16. Reply, filed Apr. 8, 1957.
17. Motion Defendant for Summary Judgment, filed 9-19-57.
18. Affidavit of Robert T. Mautz, filed Sep. 19, 1957.
19. Memorandum in Support of Defendant's Motion for Summary Judgment, filed Sept. 19, 1957.

20. Stipulation as to certain facts, filed Sept. 19, 1957.

21. Note for Motion Docket, filed Sept. 19, 1957.

22. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed Sept. 20, 1957.

23. Order on Motion for Summary Judgment (Defendant's Motion Granted). Filed Sept. 27, 1957.

24. Notice of Appeal, filed Oct. 28, 1957.

25. Bond for Costs on Appeal, filed Oct. 28, 1957.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for the appellant.

Witness my hand and official seal at Seattle this 26th day of November, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy.

[Endorsed]: No. 15822. United States Court of Appeals for the Ninth Circuit. O. H. Bengston, Administrator of the Estate of Phinice Van Pelt, deceased, Appellant, vs. Andrew Nesheim, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: November 27, 1957.

Docketed: December 19, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15822

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, deceased, Appellant,

vs.

ANDREW NESHEIM, Appellee.

STATEMENT OF POINTS

Comes now the plaintiff and respectfully alleges as follows the errors committed by the United States District Court for the Western District of Washington, from which this plaintiff appeals to the United States Court of Appeals for the Ninth Circuit.

I.

The Court erred in granting defendant's Motion for Summary Judgment.

II.

The Court erred in decreeing that the plaintiff take nothing by his complaint.

III.

The Court erred in denying plaintiff his right to trial by jury on an issue of fact.

MICHAEL J. CAFFERTY,
JOHN J. KEOUGH,
/s/ JOHN J. KEOUGH,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 19, 1957. Paul P.
O'Brien, Clerk.

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon*

FILED

MAY 11 1958

PAUL P. O'BRIEN, CLERK

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,
10th Floor,
Board of Trade Building,
Portland 4, Oregon,
Attorneys for Appellant.

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United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon*

SUMMARY OF ARGUMENT

That part of appellee's brief headed "Tort Feasor Cases Irrelevant" (App. Br. 14) it is contended is an erroneous statement of the law of indemnity in that the appellee contends:

"Even if appellee had been negligent, which we have shown it was not, this would not preclude recovery." (p. 14).

ARGUMENT

Counsel for the appellee argued in the trial Court, as he argues here, that it was immaterial whether or not the ship was guilty of negligence. It is appellee's argument that this is a contract case and, therefore, whether or not the ship was negligent is not an issue. The trial Court accepted this contention as is illustrated by the Court's remarks, a portion of which are quoted in the record:

"The Court: As I was saying to Mr. Denecke, I don't see what difference that makes, whether they should have known about it or not. You are not saying they did know about it. You are saying they should have known about it. I don't see what difference that makes. This is a contract case." (Tr. 110-111).

Counsel for the appellee argued to the trial Court:

"Now, I don't know that I need to say anything about Mr. Denecke's contention that the Mate should have examined this equipment before the boat was lowered to see that the link was in the hook, as the Captain, the last witness, said it was his duty to do.

"The Court: That, again, is tort law." (Tr. 112).

A reading of that portion of the argument and the Court's remarks thereon which is contained in the printed record, clearly shows that both counsel for the appellee and the trial Court, believed that whether or not the ship was negligent or culpable had nothing to do with the issues and the trial Court was of the opinion that if the evidence showed there was a contract requiring the appellant Albina Engine & Machine Works

to report the defects and the sailors were injured as a failure to report them, then the ship was entitled to recover indemnity.

In the appellee's brief, it is stated:

"Even if Appellee had been negligent, which we have shown it was not, this would not preclude recovery.

* * *

"The only thing that could bar Appellee would be conduct on its part which prevented or greatly hindered Appellant from performing its contract."

The appellant submits that the decisions of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S. Ct. 232, and *Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc.*, 26 L.W. 4139 (March 3, 1958), definitely do not support the contention made by the appellee.

In the *Ryan* case, the ship was initially held liable to the injured longshoreman because the longshoreman was injured by reason of improperly stowed cargo. The stevedore's defense to the indemnity action was "* * * that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring company of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonably safe manner'." (p. 134).

The majority opinion's answer to that contention was:

"Whatever may have been the respective obligations of the stevedoring contractor and of the ship-

owner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

Paraphrasing, the majority of the Supreme Court held that failure of the ship to find and correct a condition created by the stevedore was not "conduct on its part sufficient to preclude recovery." *Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc.*, supra.

In the present case, the condition was created or allowed to occur by the ship, the would-be indemnitee, not the ship repairer.

In the *Weyerhaeuser* case, supra, the longshoreman was injured by a board falling from a wood shack. The Supreme Court held, contrary to appellee's claim in the case, that if the jury found the ship negligent in certain particulars, then the ship would be barred from recovering indemnity from the stevedore. The Court's decision actually was that there were certain fact questions necessary for determination of the right to indemnity, but these had not been submitted to the jury. However, the Court's opinion was, it is believed, that the ship's failure to remove the shelter when the ship left New York, or the ship's failure to warn the stevedore of a latent dangerous condition known to the ship would bar the ship from indemnity. The Court did state, on the precedent of *Ryan*, that the ship's failure in port to find and correct the unsafe condition

created by the stevedore, would not bar the ship from indemnity.

The Court generally stated the law of indemnity to be:

“We believe that respondent’s contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here (cases cited). If in that regard respondent (stevedore) rendered a substandard performance which foreseeingly led to petitioner’s liability, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*”

Here the appellee, the shipowner, as a matter of law, was guilty of “conduct on its part sufficient to preclude recovery.”

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, DENECKE
& KINSEY,

By ARNO H. DENECKE,
Attorneys for Appellant.

No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court for the
District of Oregon.*

FILED

JAN 31 1959

PAUL P. O'BRIEN, CLERK

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,
ARNO H. DENECKE,
Attorneys for Appellant.

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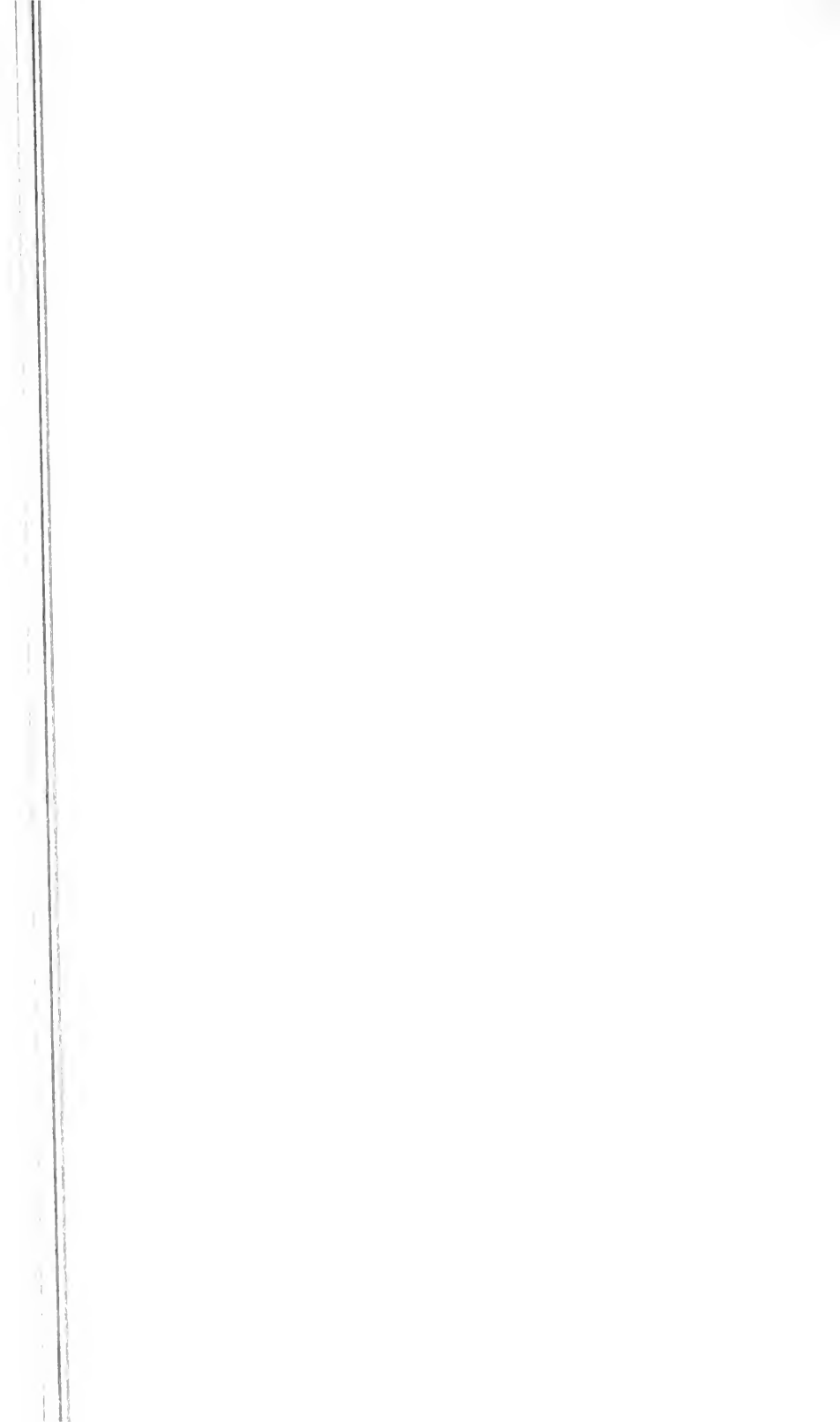
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United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court for the
District of Oregon.*

TO THE HONORABLE JAMES ALGER FEE and
RICHARD H. CHAMBERS, CIRCUIT
JUDGES, and JAMES M. CARTER, DISTRICT
JUDGE, CONSTITUTING THE COURT IN
THE ORIGINAL HEARING HEREIN:

Appellant respectfully submits that this Court has substantially erred, one of said errors affects the whole field of United States Coast Guard ship inspection, and another error will cause grave uncertainty in cases involving injury to seamen; therefore, appellant requests

that a rehearing be granted and the opinion rendered herein be reconsidered and set aside.

I.

The Court Erred in Concluding That a Vessel Operator Can Contract to Have a Ship's Statutory Annual Inspection Partially Performed by a Private Ship Repair Yard Rather Than the Statutory Designated United States Coast Guard

Here the JAVA MAIL was in for her annual inspection and repairs (Tr. 198). This Court decided that Albina (the repair yard) and American Mail (the vessel operator) had contracted to perform a part of the annual inspection,—“Ascertaining if the boat bottom withstand the strain of the authorized capacity weight * * (inspection of) the gear used in lowering the boat.” The Court stated:

“This court just cannot accept as a matter of law Albina's thesis that the proposition was that [American Mail] would furnish sand and strong arm labor to handle the sand and that its only duty was to satisfy the Coast Guard inspector that it had done what he wanted done.”

The Court did add after these remarks:

“For Albina it can be said the inspector's testimony tends to support the thesis.”

Not only did the Coast Guard inspector testify that it was his job, not the repair yard, to inspect the gear used in lowering the boat, but he testified that he did inspect this gear, including the hook and ring, on April 5, two days before the weight test, and the day before the sand was requested (Tr. 97, 103, 105, 209).

The Albina superintendent testified that he did not intend to contract to inspect the lifeboat or davits; that that was the job of the Coast Guard inspector (Tr. 84).

American Mail's representative, O'Toole, testified he did not intend to contract for Albina to do any testing or inspecting of the lifeboat or davits.

O'Toole testified that Albina put the sand in the boat, floated it under the falls: "They (Albina) then hooked the boat onto the falls and raised it sufficiently high out of the water to hold it sufficiently long until the Coast Guard surveyor on the job was satisfied that everything was fine. During that time he would be looking at the boat, at the cables, at the hooks, at all gear pertaining to handling the lifeboat and he then, I assume, told them that everything was alright, at which time they would have refloated the boat * * *." (Tr. 204.)

O'Toole was further questioned:

"Q. Is there anything to be done in the weight test by Albina or whoever else it is doing it, some other repair yard, other than placing the sand or whatever other weights they want to put in the boat and raising it or lowering it as the Coast Guard inspector directs?

A. They have all handling of the boat." (Tr. 204.)

O'Toole further testified:

"Q. As the Port Engineer, do you consider it the duty of the repair yard in conducting a weight test—not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the

ring to become disengaged when it is resting in the water?

A. No, that is not necessarily part of their work.
* * *."

Neither did the trial court find that Albina had an duty to test or inspect the lifeboat or its gear (Find. of Fact No. 2, Tr. 34). The trial court found "Defendant (Albina) was to make weight tests." This is the language that the specifications used and which both the parties testified meant supplying of sand, putting it in and taking it out of the boat. At no place in its findings or conclusions did the trial court interpret the contract as requiring Albina to make any inspection.

The statute requires the Coast Guard to make the annual inspection (46 USCA Sec. 391) and the statute requires the Coast Guard to certify that it, and no one else, has inspected the ship, including the life-boats and that the ship is in order (46 USCA Sec. 399). The Coast Guard inspector testified it was his duty and he did make the test and inspection of the gear here involved. The two contracting parties, American Mail and Albina, are agreed that the contract did not require any testing or inspecting by Albina. The trial court did not find to the contrary. There just is no support of any kind for this Court's holding that Albina did have a duty to test and inspect this gear and it is respectfully submitted that this Court is in error in so holding. Such holding being in error, the judgment of the trial court must necessarily be reversed because this Court's affirmance of indemnity was on the basis that Albina breached contractual duty to test and inspect the lifeboat.

II.

**The Trial Court Erred in Deciding That American Mail
Line Had no Duty to Its Sailors to Inspect the Lifeboat
and This Court Erred in Concluding That Such Decision
Was Not Clearly Erroneous**

In an implied indemnity suit whether or not the party seeking indemnity was negligent is a relevant question, contrary to the belief of the trial court and the statement of appellees' counsel (Tr. 110, 112). Despite counsel's statement, the appellee had the trial court enter a finding:

"Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect." (Finding of Fact No. 9, (Tr. 36.)

and

"The said two men commenced actions at law in the state court, which were removed to the United States District Court for Oregon, to recover damages for their said injuries because of the unseaworthiness of said lifeboat." (Finding of Fact No. 10, Tr. 36.)

Appellant filed objections to these findings, but said objections were never passed upon and, as far as appellant knows, the trial court's illness was such that he never again took the bench after these objections were filed.

The issue, as framed by the appellee in its complaint and its contentions in the pretrial order, was, could the appellee recover indemnity for sums it had to pay the injured seamen because of the ship's *negligence*? Negli-

gence was assumed by the appellee. No contention was made that the only source of liability of American Mail was unseaworthiness. The amended complaint states:

“The liability of plaintiff to said Benjamin E. Nelson arose under what is known as the Jones Act for failure to furnish a safe place to work and other causes actionable under said Act * * *.” (Tr. 21-22.)

The plaintiff contends in the pretrial order, which was only supplemental to the pleadings:

“That under the admiralty and maritime law *and* the Jones Act, plaintiff was liable to Nelson and Yee not only in damages, but for their maintenance and cure * * *.” (Tr. 30.)

Liability under the Jones Act is for negligence. American Mail has stated it was liable to Nelson and Yee for negligence. When a party admits negligence, is not a trial court's finding that such party was not negligent erroneous?

In addition to the above, the trial court's finding of no negligence is contrary to universally established law. The trial court made “no negligence” a finding of fact. This Court proceeded as if it were a matter of fact and concluded that, being a question of fact, this Court cannot decide there was no evidence to support said finding. It is respectfully submitted that this problem cannot be decided on that basis, i.e., “* * * We are satisfied that the trial court did not have to find as a matter of law that American Mail was negligent. It could have so found, but did not.”

The evidence was, and the trial court found, that American Mail did not inspect “the swivel and hook

and keepers before commencing the boat drill." (Finding of Fact No. 9, Tr. 36.) The only question left is, did American Mail have a *duty* to inspect the boat and its gear, or didn't it. This is not a matter on which a court can find either way and still not be clearly erroneous. Either American Mail had a duty to inspect or it didn't and the answer is a matter of law, not a matter within the discretion of the trier of fact.

"Negligence is a question of law and fact. It arises from a failure to perform a legal duty and it includes two questions: first, whether a particular act has been performed or omitted. Second, whether the performance or omission of this act was a breach of a legal duty. The first question is one of fact. The second is one of law. 'The law determines the duty; the evidence shows whether the duty was performed.' " *New York and Porto Rico SS Co. v. Guanica Centrale*, 231 Fed. 820 (CCA 2nd).

Under the Jones Act, there is no room for doubt that a ship operator has a duty to its seamen to inspect ship's equipment and a failure to do so is negligence as a matter of law. The cases are voluminous for this proposition. Two from Oregon are as follows:

Carlson v. Wheeler-Hallock Co., 171 Ore. 349, 137 P.2d 1001. Here skid boards, which were used to make a temporary flooring over stowed cargo, were involved. At page 358 the court stated:

"It does not appear, however, that it was any part of plaintiff's (sailor) duty to inspect the skid boards, *whereas it was most certainly the mate's duty.*" (Emphasis supplied.)

In *The Mercier*, 5 Fed. Supp. 511, Judge Fee, sitting as a District Judge, stated:

“The expression ‘might with reasonable care have known’ applies to duty of inspection upon the part of the ship, *which is a well recognized requirement.*” (Emphasis supplied.)

The duty on the ship owner to inspect is unequivocal, the breach by American Mail is unequivocal and negligence by American Mail as a matter of law is unequivocal. This negligence bars American Mail from indemnity. Any other result would mean the defeat of the purpose for appellate courts by avoiding a decision on a legal issue by naming it a fact issue.

In summary, it is submitted that this Court erred in deciding, contrary to the testimony of all parties concerned, that Albina had a duty to test the lifeboat and its gear; and the Court further erred in concluding that the trial court's holding that American Mail was not negligent was not clearly erroneous despite the fact that appellee admitted the negligence and the issue is solely one of law.

Respectfully submitted,

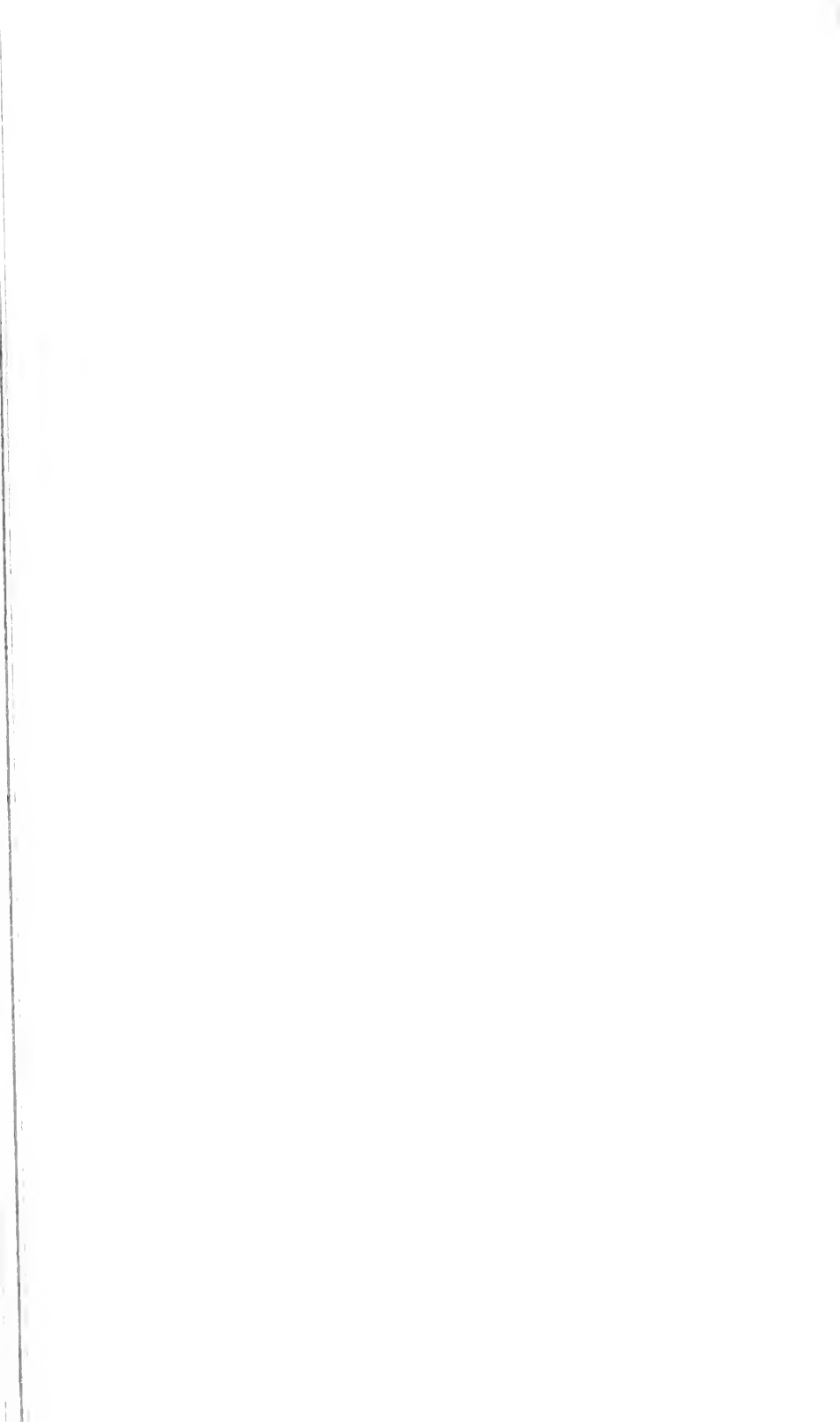
MAUTZ, SOUTHER, SPAULDING, DENECKE
& KINSEY,
By ARNO H. DENECKE,

Attorneys for Appellant.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Arno H. Denecke, of attorneys for Petitioner do hereby certify that the foregoing petition for rehearing is well founded in my judgment and is not interposed for the purposes of delay.

ARNO H. DENECKE



No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

BRIEF FOR APPELLEE
AMERICAN MAIL LINE, LTD.

*Appeal from the United States District Court for the
District of Oregon*

FILED

APR 2 1958

PAUL P. O'BRIEN, CLERK

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
JOHN D. MOSSER, on the brief,
1310 Yeon Building,
Portland 4, Oregon,
Attorneys for Appellee.

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| Corbin on Contracts, §§ 571, 947, 1264 | 16 |
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United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

BRIEF FOR APPELLEE
AMERICAN MAIL LINE, LTD.

*Appeal from the United States District Court for the
District of Oregon*

Any facts supplementary to those in Appellant's
Statement of the Case can be stated in our Argument.

SUMMARY OF ARGUMENT

Appellant, Albina, made a contract with Appellee,
American Mail, to make a weight test of the JAVA
MAIL's life boats, "cable, davits, etc." This included
reporting any defects found, so they could then, on order,

be repaired. Albina did find a serious defect, namely, that the condition of the hook on the after end of the lifeboat, and of its "finger guards" or "keepers" was such as to permit the link at the end of the davit-fall to disengage from the hook and allow the boat to fall into the water, even when the releasing gear, supposed to prevent, along with the "keepers," such disengagement, was locked. Albina did not report such defect, and in failing to do so breached its contract. American Mail did not know of the defect. Shortly after the test was completed, the JAVA MAIL's crew had a boat drill, during which, because of said defect, the boat fell, seriously injuring two crewmen and damaging the lifeboat. American Mail compromised and paid the seamen's claims, after notice to Albina. American Mail is entitled, as damages for said breach of contract, to recover from Albina the amounts paid the two seamen, the damages to the lifeboat and its costs and expenses. Albina does not question the amount, \$50,045.01, which has been stipulated (R. 36). This is a simple action at law to recover damages for breach of contract. Tort law is not applicable and for that reason the discussion of the joint tortfeasor cases in Appellant's Brief is irrelevant. It is irrelevant for the further reason that the Trial Court held on substantial evidence that plaintiff was not negligent in any respect.

ARGUMENT

The issues are fairly simple. It is admitted there was a contract. The issues are:

What was the contract?

Was it breached?

If so, has any conduct of Appellee barred its right to damages?

WHAT WAS THE CONTRACT?

The contract was to make a weight test of the ship's port and starboard lifeboats, their equipment, cable, davits, etc. American Mail and Albina, through their respective representatives, Mr. Toole and Mr. Bailey, orally agreed on this about April first, and the Specifications were written up afterward. Though written up afterward, they embodied the true agreement of the parties, and followed the wording of previous identical Specifications that had been written up between the two men often before and subsequently. The Specification is Item 30 on Exhibit 3 (R. 109), and reads as follows:

"Annual Inspection continued. Item No. 30.

"Weight Testing—Port and Starboard Lifeboats and *Equipment*. (Emphasis supplied.)

"Furnish weight, 165 pounds per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard Lifeboats, Cable, Davits, etc.

"Note: To be accomplished to satisfaction of U.S.C.G." (R. 109).

These Specifications make it plain in so many words that the equipment, and the cable, davits, etc. were to be weight tested, and since the work was to be done to the satisfaction of the U.S. Coast Guard, it is pertinent to turn to the Coast Guard Regulations themselves, which provide that in lifeboat tests "all other items of life saving equipment shall be examined to determine that they are in suitable condition" (Plaintiff's Exhibit 1, R. 119).

Referring to the fact that these Specifications had been written up in the same form many times before between the same parties, and to the fact that they, in this instance, were written up after the accident, Mr. Bailey of Albina testified that it was customary to write them up in this manner, but that to the best of his recollection (he was not certain) previous Specifications had stopped at the word "lifeboats" and had omitted "cable, davits" etc. (R. 85), but was frank enough to say that "I don't think there is a difference in meaning, particularly" (R. 86). And of course there could not be. If you are going to weight-test a lifeboat, you naturally have to test the hooks, davits, falls and equipment, which are part of it and are going to hold the weight.

It is noteworthy that after the accident Albina sent American Mail a bill for this work, using exactly the same language as the Specifications, thus adopting them without quibble (Exhibit 9-a, R. 50).

The foregoing is merely to give the Court a full recital of how the contract was arrived at, and what the words were.

Appellant does not question all of this. What appellant questions is the interpretation of the contract. Appellant contends that all it had to do was put enough sand in the boat to provide the weight and take it off when the test was finished. Appellant's contention is stated succinctly at Page 12 of its Brief:

"It seems obvious to the appellant, and the appellant so contends, that weight testing was the function of the U.S.C.G., and that all Albina was to do was to get the sand, put it in the lifeboat, and when the Coast Guard was finished, take it off."

In reply to this we point out:

That contrary to the test being a "function of the U.S.C.G.," the contract was not with the U.S.C.G. at all, but was between American Mail and Albina;

American Mail
That ~~Albina~~ paid the bills for it;

That the contract itself refers to testing the "Equipment" and does not stop with "Furnish weight, 165 pounds per person for 66 persons capacity." It continues "And *accomplish weight test* of each the port and starboard lifeboats, cable, davits, etc." (R. 109);

That Mr. Toole testified particularly, without contradiction, that the contract was not merely to satisfy the Coast Guard, but was also to satisfy American Mail, and that if American Mail was not satisfied, they could request Albina to do more (R. 50-51);

That the Coast Guard Inspector, Endreson, testified:

"Q. And the ship repair yard does what in connection with the test?

A. Well, they have an understanding or contract with the operator or the owners in regard to making repairs as a rule.

Q. Leaving out the repairs, Captain Endresen, and merely on the conduct of the test.

A. Well, no matter what is carried on it is generally between the owners and the contracting party." (R. 97-8).

In conformity with its contention that all it had to do was put the sand in the boat, Albina contends that even though it discovered a defect in the boat and its equipment, it had no duty under its contract to report such defect or do anything about it, no matter how dangerous it might be. This interpretation of the contract is contradicted not only by reason but by Mr. Toole, and by Albina's principal witness, Mr. Bailey. Mr. Toole testified as follows:

"Q. You have, I suppose, had many of these contracts with the shipyards, have you not?

A. Yes, sir.

Q. In your interpretation of the contract and in the practice among shiprepair men was Albina's obligation under the contract, if they found anything wrong with either the finger guards or this hook, to report it to you or do something about it?

Mr. Denecke: Same objection.

The Court: He may answer.

A. Yes, sir. I would expect them to tell me anything they found wrong so we could correct it.

Q. If they reported anything wrong to you, you would give the order to them to correct it; is that right?

A. Yes, sir." (R. 51).

Mr. Bailey testified as follows:

"Q. Mr. Bailey, is it your understanding of the instructions you received from Mr. Toole that Albina was to do anything further about the lifeboat other than provide the weight, to get the weight in and out of the lifeboat, for the weight test?

Mr. Wood: Excuse me, your Honor, I don't see how he can answer that. He says he doesn't remember the conversation that he had with Mr. Toole.

The Court: He may answer if he can.

A. Mr. Wood is right, I don't remember the conversation that I had with Mr. Toole. I might say, however, that anything we felt was unsafe and it came to our attention would ordinarily be reported to Mr. Toole or to somebody with authority." (R. 83).

The foregoing only accords with common sense. The plain meaning of a weight test, is to test something to see whether it will sustain a given weight, in this case the lifeboat and its hook and keepers attaching it to the davit falls. In fact, the hook and keepers are among the most important things to test, because life itself (and this ship carried passengers (R. 107)) may depend on their satisfactory condition to hold the boat with the weight in it under all circumstances. This very accident shows that this hook with its keepers was not in condition to hold the boat with the weight in it under all circumstances. Its condition was such that with the keepers permitting the davit swivel-link to ride on the point of the hook, the hook would not sustain the weight of the boat but let it slip off.

Suppose the hook had a visible crack in it, which plainly impaired the integrity of the hook, and yet, for the time being at least, did not prevent the hook from sustaining the boat's weight. Can it be said that the contractor, employed to make a weight test, should ignore this condition and say nothing about it, dangerous though it might be? Has he fulfilled his contract merely by putting some sand in the boat?

Or suppose one of the cables of the davit falls is "stranded", but nevertheless is strong enough, for the time being, to hold up the weight. Has the contractor fulfilled his contract merely by putting the required weight in the boat? To ask these questions is to answer them.

Some quibbling took place over the word "inspecting". Mr. Toole was asked whether he thought it the duty of the contractor to inspect the lifeboat's equipment. He said "No"; but he explained that by inspecting he meant things like opening up and taking apart some piece of machinery like a pump, and that the contract did not in his interpretation require Albina to inspect in that sense, but that they were bound to report to him any defects which they found so these could be remedied (R. 52-5). The reason for this is plain. The contract did not require Albina to repair anything. Repairs cost money and would not be included in the \$240 paid Albina for the weight test. But if Albina discovered a defect requiring repairs or renewals, it was then obligated to report the defect to Mr. Toole so that an agreement could be reached for the making of said repairs or renewals and the cost thereof.

This, both the testimony of Mr. Toole and Mr. Bailey, previously referred to, makes plain.

This interpretation of the contract is the one adopted by the Court in its Finding of Fact 5 (R. 34-5), and as it rested, not merely on the written words, but on the oral testimony of Mr. Toole and Mr. Bailey, and is really not contradicted anywhere, must under the McAllister Rule be sustained.

WAS THE CONTRACT BREACHED?

The breach of the contract cannot be denied. Mr. Stene, Albina's man in the lifeboat, who was making the test, saw that the lifeboat's hook was blunt on the end, and that the keepers were bent or short and spread so as to be ineffectual, and saw that, because of this, the swivel link would slip out from the hook even when the releasing gear was locked, realized that it was dangerous (especially, for he was an experienced man), but reported it to no one, and did nothing about it whatever. He was in a hurry. It is unnecessary to detail his testimony. It will be found on pages 59-66 of the Record.

The Trial Court found that in the foregoing respects defendant breached its contract (Finding 6, R. 35).

That the damages were the result of said breach hardly needs discussion. About half an hour after the test was completed the ship was conducting a boat drill, and because of the aforementioned unreported defects, the swivel link came out of the hook and the boat fell into the water causing damages, the amount of which has been agreed upon. The Trial Court so found in its Findings 8 and 10 (R. 35, 36) and its Conclusions on page 37 of the Record.

HAS ANY CONDUCT OF APPELLEE BARRED ITS RIGHT TO DAMAGES?

Appellant attempts to defeat the claim for damages by arguing that appellee was negligent "(1) In permitting this defect to exist when the plaintiff either knew, or because of the existence of the defect over a period of time, should have known existed. (2) In per-

mitting the two injured persons to enter and remain in the lifeboat without inspecting the falls, which inspection would have readily shown the danger." (Br. 20-21). In short, appellant is urging upon the Court that appellee was a joint tortfeasor.

The answer to appellant's argument is twofold:

First, the Trial Court has found on substantial evidence that appellee was *not* negligent in either of the respects claimed.

Second, the joint tortfeasor doctrine has no application to this case under recent decisions of the U.S. Supreme Court, as we shall show.

Appellee Was Not Negligent

We shall discuss the factual questions first. The testimony is uncontradicted that the appellee did not know of the pre-existing condition of the hook and keepers (R. 91, 178), "Plaintiff did not know of, and had no reason to suspect the existence of, said defect." (Finding 7, R. 35). This Finding is amply supported by the evidence. After the accident, when an examination was made at Portland, and again at Longview, and an actual trial was had to see whether the link could slip out through the keepers, it was then discovered that that could happen, but it took a trial to determine it (R. 55). It was this that Mr. Toole referred to in his testimony quoted on Page 16 of Appellant's Brief, when he said:

"Q. Was that condition that you saw there, Mr. Toole, one that was quite open and apparent *when you looked for it*?

A. *When you looked for it, yes, it was very apparent that it would fall out.*" (Br. 16) (R. 55-6). (Emphasis supplied.)

And this was recapitulated in counsel's question,

"Q. Am I correct, Mr. Toole, that anybody that looked at this hook, ring and guard would see that the guard was in such a position or the ring was of such size that you could slip it out despite the guard being there?

A. It was apparent that that would occur, yes." (Br. 16) (R. 56).

In short, when the accident motivated a close examination and trial of the equipment to see what could have caused the fall, it was then discovered,—“when you looked for it”—that the keepers were spread.

This, however, is no criterion of the inspection that would normally be made of the boat and its equipment during the prior period when it must have functioned satisfactorily.

In confirmation of this is the evidence that Captain Endresen, the U.S. Coast Guard Inspector, whose especial business it was to examine this equipment, did so before the accident, and his inspection revealed nothing wrong.

“Now, Captain Endresen, did you make an inspection of this lifeboat prior to the accident?

A. I did. I was in the boat during the annual inspection checking the equipment, and so on.

Q. And is an inspection of the hook and the ring a necessary part of your inspection?

A. It goes with the inspection.

Q. Did you make some examination of this ring and hook?

A. I glanced at them and noticed them, yes" . . . (R. 97).

"Q. Now, you said that this hook and the keepers, as you call them, were part of the lifeboat's equipment?

A. Yes.

Q. And you glanced at them?

A. That is right.

Q. Will you tell me where you were and where the boat was when you glanced at them?

A. The boat was in the davits and I was in the boat.

Q. You were in the boat?

A. No. Pardon me, your Honor. The boat was up in the davits secured. That is when I was checking the equipment for the boats.

Q. (By Mr. Wood): You got into the lifeboat?

A. Yes.

Q. While it was suspended from the davits?

A. All the way home, with the gripes on it, secured.

Q. Was that after the test?

A. Before the test.

Q. Before it was taken out of its cradle at all?

A. That is right.

Q. That is when you got in the boat?

A. Yes.

Q. And you looked at the equipment?

A. Yes.

Q. Including this hook and guards?

A. Yes.

Q. You glanced at it?

A. That is right.

Q. And did you observe—

A. I observed. That is all I do, is observe, you know.

Q. Did you observe that the guards were lowered from the point of the hook?

A. No, I didn't. I took them to be okeh then."
(R. 102-4).

This examination was on April 5, 1955, two days before the accident (R. 105).

There was thus substantial evidence in support of the Trial Judge's Finding 7 above quoted, that appellant did not know of and had no reason to suspect the existence of the defect (R. 35), and therefore was not negligent (Findings 7 and 9).

As to the second alleged act of negligence, namely, in not inspecting the falls just before the lifeboat drill, the answer is that here again the Trial Court found on substantial evidence that "Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill and was not otherwise negligent in any respect." (Finding 9, R. 36).

This Finding is amply supported by the evidence.

Patterson, the mate, had a right to assume that when Albina's men left the boat they would leave it with the releasing gear locked and proper keepers in place. He had a right to rely on that. In this condition it is impossible for the link to slip out of the hook. Patterson did not know that the keepers were defective. Albina's men did. The raising of the boat from the water up to its cradle on the boat deck and its lowering from the cradle back to the water is purely mechanical. Nothing during that operation touches or disturbs the connection between the link and the hook, and it is impossible at any time during that operation, with the releasing gear locked and proper keepers in place, for the link to come out. No change takes place. Therefore, Patterson, not knowing of the defective keepers, had a right to rely on Albina hooking up the boat properly, and that it was still in safe con-

dition when he ordered it to be lowered. He could not see the connection from his position on the boat deck. The photograph, Exhibit 6, attached to Hinrich's deposition, shows that the hook and link are above his line of vision and obscured by the lifeboat itself. He testified:

"Q. Now, before you started this lowering of the boat and when the fire and boat drill first began, and you were on the boat deck, did you make any inspection of the link in the hook by which the boat is supported to the falls?

A. No, I did not. I did not inspect it.

Q. Is it customary for the Mate in charge of the lifeboat to inspect the attachment of the link to the hook?

A. It is not customary to inspect.

Q. What do you rely upon?

A. This is a patented device. There could not be anything wrong with these hooks or with anything, if you got the weight on the falls, there is nothing that can happen." (R. 162).

All of the foregoing was substantial evidence on which the Trial Court properly found that the appellee was not negligent in the respect claimed.

Tort Feasor Cases Irrelevant

Even if Appellee had been negligent, which we have shown it was not, this would not preclude recovery.

This is a case in contract in which the doctrines of tort feasors, "active" or "passive," "primary" or "secondary" negligence have no place.

The only thing that could bar Appellee would be conduct on its part which prevented or greatly hindered

Appellant from performing its contract. There is nothing like that in this case. The alleged acts of negligence, urged by Appellant, i.e., failure to inspect, did not in the remotest degree prevent or hinder Appellant in the performance of its contract.

These principles of law were stated in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, and even more clearly in *Weyerhaeuser SS Co. v. Nacirema Operating Co., Inc.*, just decided. March 3rd, 1958, by the U.S. Supreme Court and reported in 26 Law Week 4138.

We are sure this Court remembers the facts in the Ryan case. The shipowner sued the stevedore for indemnity on account of damages paid a longshoreman hurt by rolls of paper improperly stowed by the stevedore. The stevedore countered that the shipowner had a duty to oversee the stowage and was at fault. The Court, pointing out that the case was in contract and the tortfeasor cases had no application, held that, regardless of the shipowner's alleged fault, the stevedore, "as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of warranty cannot here excuse that breach" (350 U.S. at pp. 134-5).

So here. Albina was hired to test the lifeboat and its equipment. American Mail's failure to discover and correct Albina's "own breach of contract cannot here excuse that breach."

The Weyerhaeuser case is even more explicit. The suit was by the shipowner for indemnity from the stevedore for damages paid by the shipowner to Connolly, a longshoreman injured by a timber falling from a flimsy shelter, built to protect the winchman from the elements. It had been built by the stevedore while the ship was in New York; was allowed by the ship to remain in place, contrary to custom and due care, during a five days' voyage from New York to Boston, and there again used by the stevedore "in spite of the fact that respondent (the stevedore), as well as petitioner (the shipowner), must have known of its journey from New York, and the possible effect of such a journey on an already flimsy structure. There was evidence that the shelter was not inspected by either party until the injury to Connolly five days after the arrival in Boston."

The Court pointed out that the case was in contract, and was governed by different principles of law from those in the action of Connolly against the shipowner, where the shipowner had been held negligent.

The Court in a footnote referred to Corbin, Contracts, §§571, 947, 1264, as indicating the kind of conduct which, on the part of the shipowner, would preclude recovery. Such conduct is stated by Corbin in §571 to be:

"If a promisee prevents or greatly hinders the other from rendering a promised performance, he cannot maintain action against that other for breach; the prevention operates as a defense."

Sections 947 and 1264 are to the same effect.

In the present case, American Mail did nothing whatever to hinder or prevent Albina from performing its contract. The alleged acts of negligence, i.e., (1) permitting the defect to exist, and (2) permitting the two injured men to enter the boat without inspecting the falls, obviously did not, and could not, hinder or prevent the performance of the contract in any particular. In fact, the second act occurred after the breach.

The Supreme Court explained:

“Further, the verdict for Connolly did not *ipso facto* preclude recovery of indemnity by petitioner, for as we have indicated, the duties owing from petitioner to Connolly were not identical with those from petitioner to respondent. While the jury found petitioner ‘guilty of some act of negligence,’ that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under Ryan, prevent recovery by petitioner in the third-party action. 350 U.S., at 134-135.” (26 Law Week at p. 4139)

We interpret the foregoing to mean that none of the failures mentioned therein would preclude the shipowner from recovery, but that certainly at least failure to inspect and correct the unsafe condition would not. This should dispose of Appellant’s contention that American Mail’s failure to inspect the lifeboat hook and keepers precludes it from recovery.

CONCLUSION

Judge McColloch listened to this case carefully, and carefully considered it. Under McAllister, the judgment should be affirmed, and that is what we ask.

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~~Proctors~~ for Appellee.

No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon*

FILED

MAR 8 1958

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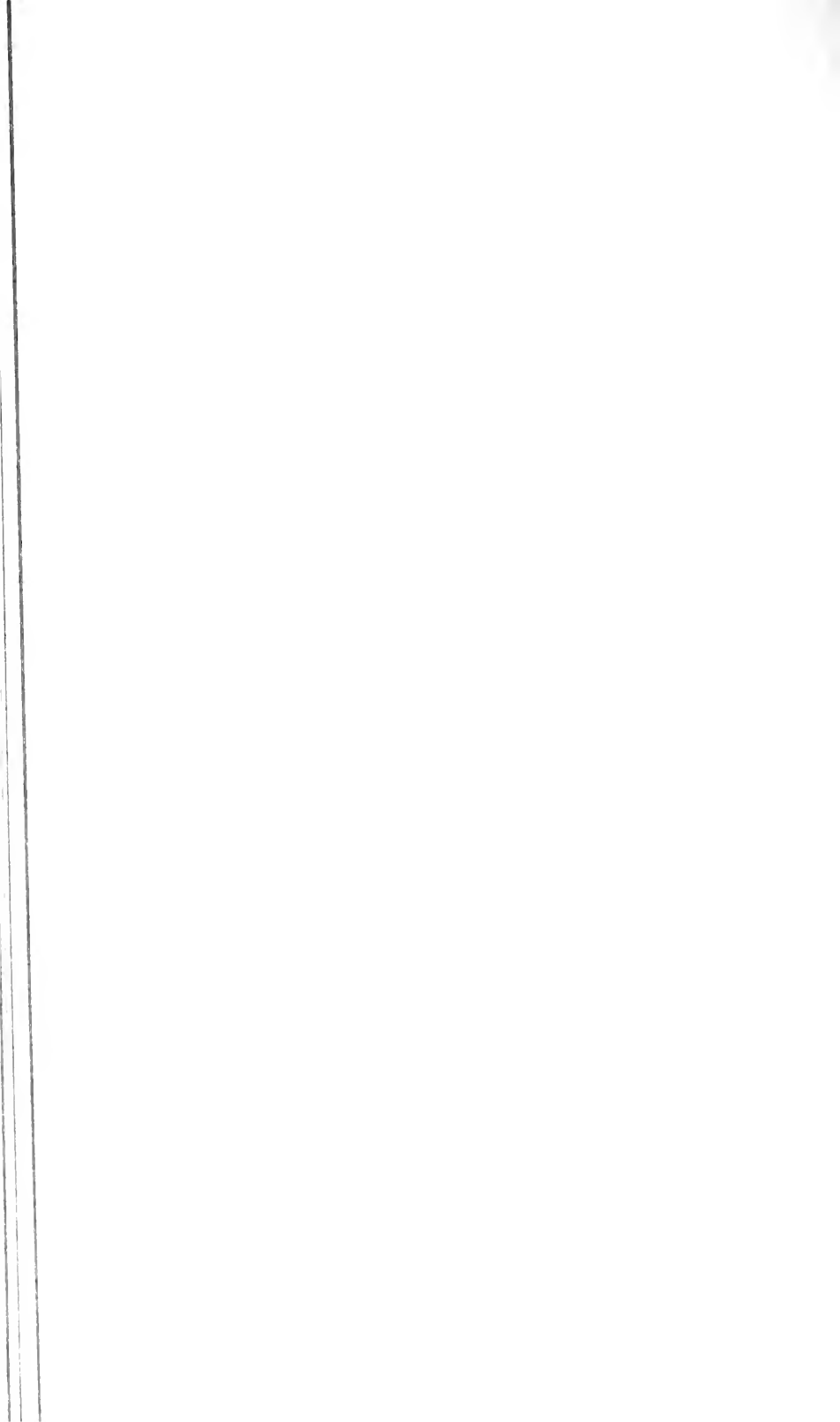
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No. 15829

United States
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ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon*

**STATEMENT OF PLEADINGS AND
BASIS FOR JURISDICTION**

This is an appeal from a final judgment of the United States District Court for the District of Oregon. This is an action, brought on the law side, for indemnity by a ship operator against a ship repair yard. Indemnity sought is for loss and expense incurred by reason of injuries to seamen employed by the vessel. Appellate juris-

diction is granted to this Court by Title 28, Section 1291, USCA. The trial court had jurisdiction by reason of the diversity of citizenship of the parties and the amount in controversy, exclusive of interest and costs, exceeding the sum of \$3,000.00.

STATEMENT OF THE CASE

The plaintiff, appellee, hereinafter referred to as American Mail, is a Delaware corporation and owns and operates ocean-going vessels, including the JAVA MAIL. The appellant, defendant, Albina Engine & Machine Works, Inc., hereinafter referred to as Albina, is an Oregon corporation and operates a ship repair and ship building yard in Portland, Oregon, on the Willamette River.

The JAVA MAIL was up for her annual inspection and needed voyage repairs (Tr. 198). Specifications for repairs were prepared, bids were taken, and the appellant was the low bidder, and the work was awarded to the appellant (Tr. 199).

On or about April 6, 1955, the Coast Guard notified the appellee that they wanted to weight test the lifeboats and Mr. Toole, then the port engineer for the appellee, verbally told Mr. Bailey, repair superintendent for the appellant, that the Coast Guard wanted a weight test on the lifeboats and asked Albina to take care of it. Subsequent to the accident, American Mail prepared written specifications on this.

The weight test was performed on April 7, 1955, and subsequently on that day the lifeboat fell, causing injuries to two crew members, Nelson and Yee. Appellee settled litigation brought by these crew members for their injuries against both American Mail and Albina and it is for appellee's loss and expense caused by these injuries that the appellee in this litigation seeks indemnity from the appellant. There was no indemnity agreement between the parties.

Subsequent to April 7, 1955, the appellee drew up supplemental specifications, one of which specifications was for weight testing lifeboats. The supplemental specifications are a portion of appellee's Exhibit 3 and, while they are dated April 7, 1955, there is no question but that they were actually prepared after April 7th (Tr. 49). The particular specification in question is on Page 2 of Supplement No. 1, appellee's Exhibit 3, Item No. 30, stating:

"WEIGHT TESTING—PORT AND STARBOARD LIFEBOATS AND EQUIPMENT. Furnish weight, 165# per person for 66 person capacity, and accomplish weight test of each of the port and starboard lifeboats, cables, davits, etc. NOTE: To be accomplished to satisfaction of U.S.C.G."

This weight test was required pursuant to Coast Guard regulations Section 91.25-15 which provides:

"At each annual inspection the inspector shall conduct the following tests in inspections of lifesaving equipment. * * *" (Appellee's Ex. 1, Tr. 119).

Pursuant to the verbal order regarding the weight test, on the morning of April 7, 1955, Albina had some

sacks of sand available. Under the regulations it was required that the boat be loaded with persons or dead-weight equal to the allowed capacity of the lifeboat, considering persons to weigh 165 pounds each (Appellee's Ex. 1, Sec. 91.25-15(a)(2); Tr. 119). The lifeboat, with witnesses John Stene and Leslie Becvar in the boat, was brought around from its position to a place alongside the ship where sandbags were put aboard. After the sand was in the boat, the two Albina employees took it back underneath the falls and hooked it up (Tr. 151). Then, with the Albina men remaining in the boat, the boat was lifted with the weight in it. The Coast Guard inspector indicated his satisfaction and the boat was lowered again, released from the falls, taken back to the place where the sand could be discharged, and then brought back again under the falls (Tr. 152). The boat was again hooked up by the Albina employees and after being raised and then lowered again, the Albina employees left the boat while it was bobbing in the water (Tr. 61). Sometime subsequently, it was raised out of the water, swung into its cradle and the gripes put on (Tr. 125). All the raising and lowering of the boat was done by ship's personnel (Tr. 78).



The lifeboat was raised or lowered on cables known as falls. On this particular boat at the end of the falls there were several metal links and at the end was a metal link or ring. The boat was attached to the falls by this metal ring being slipped over a metal hook, sometimes called a pelican hook, which hook was attached to the lifeboat, one being in the front and one being in the rear. The hook was supposed to be disengaged from the ring by moving back so that the point of the hook was in a horizontal plane rather than a vertical plane (Tr. 143). The hook was part of what was known as a releasing device. When this releasing device was closed, the hook could not move backwards and release the ring. When it was open it moved the hook back so that the ring could be released (Tr. 59). To prevent the ring from slipping out of the hook when there is no tension on the falls, there were two metal finger guards or keepers, the ends of which are near the point of the hook and when in proper size and condition did not allow enough space at the point of the hook for the ring to slip off. Both parties concede that, at the time of the accident, the ring, with the releasing gear closed and no tension on the falls, could slip over the hook and the keepers or guards would not prevent this (Tr. 55 and 62). While there has been no formal admission, it also appears unmistakably that, if this condition had not existed, the accident would not have occurred.

Sometime after 10:00 o'clock on April 7, 1955, the ship held a boat drill. The third mate, Patterson, was assigned in charge of the starboard lifeboat although it normally was the second mate's boat (Tr. 155, 168).

Patterson assigned certain men to the starboard lifeboat, not the men who usually were in the starboard lifeboat (Tr. 135). Two sailors so assigned, Hinrichs and Nelson, got in the lifeboat on the boat deck. No one checked, or was asked to check, the falls (Tr. 162). The boat was lowered to the next deck, the cabin deck, and it was discovered that the rudder was not in the boat so the boat was stopped. While Mr. Patterson went to get the rudder, two other men, Chan Yee and Flovik got into the boat (Tr. 189). The boat was started up when it was noticed that the ring was not secure in the hook but was resting on the point, and immediately after that the boat fell, and Nelson and Yee suffered injuries.

As the pre-trial order states (Tr. 28), Nelson and Yee sued American Mail Line and Albina for their injuries, but later took a voluntary non-suit as to Albina. American Mail Line, after first notifying defendant, Albina, that it was about to do so and would hold defendant liable by way of indemnity, settled the Nelson case for \$35,000 and the Yee case for \$6,750. These cases are brought to recover this loss, American Mail's expense in repairing the lifeboat, in the amount of \$3,683.01, maintenance paid Nelson and Yee, for Nelson \$1,688 and for Yee \$124, and for American Mail's attorneys fees in defending both cases in the total amount of \$2,100. The total amount sued for by American Mail Line and the amount awarded by the trial court was \$50,045.01.

SPECIFICATIONS OF ERRORS

Appellant contends that the trial court erred in the following particulars:

1. In finding that American Mail Line and Albina entered into a contract by which Albina was to make weight tests on the port and starboard lifeboats of the JAVA MAIL and their equipment and that it was an obligation of Albina under said contract to report to the plaintiff any defects discovered in said equipment (Findings of Fact No. 5; Tr. 34-35).

2. In finding that the defendant breached its contract with the plaintiff concerning the JAVA MAIL in that defendant discovered that said equipment was dangerous and did not report this fact (Finding of Fact No. 6; Tr. 35).

3. In finding that the plaintiff, American Mail Line, did not know of and had no reason to suspect the existence of said defect (Finding of Fact No. 7; Tr. 35).

4. In finding that American Mail Line was not negligent nor at fault for not inspecting the swivel and hook keepers before commencing the boat drill and was not otherwise negligent in any respect (Finding of Fact No. 9; Tr. 36).

5. In making the legal conclusion that Albina breached its contract with the plaintiff and that judgment for the plaintiff and against the defendant should be entered (Conclusion of Law; Tr. 37).

ARGUMENT

SUMMARY OF ARGUMENT

The appellant contends that it did not breach any contract it had with American Mail as such contract did not require it to inspect the lifeboat for defects nor report defects which were discovered and which were apparent and obvious. It also contends that it had no legal duty, apart from contract, to report a defect which was open and obvious. Not having breached any contract with American Mail nor having breached any duty imposed by law, Albina is not obligated to indemnify American Mail. Further, American Mail Line was negligent to Nelson and Yee and such negligence was the proximate cause of their injuries. Such negligence consisted of permitting the defect to exist and failing to have it corrected and, secondly, in failing to examine the linking of the falls to the lifeboat before permitting Nelson and Yee or any other sailors or persons to get into the lifeboat. American Mail also breached a duty to Nelson and Yee in failing to furnish a seaworthy vessel. American Mail Line itself being negligent, and otherwise liable, cannot recover indemnity from Albina because, even if Albina had breached the contract and was negligent, American Mail would at least be a joint tortfeasor and, therefore, not entitled to indemnity.

FIRST, SECOND AND THIRD SPECIFICATIONS OF ERRORS

The court erred in finding that:

“Plaintiff and defendant entered into a contract by which defendant was to make weight tests on the port and starboard lifeboats of said JAVA MAIL and their equipment, including the cables, davits, etc. * * * It was an obligation of defendant under said contract, in making tests of the equipment, to report to plaintiff any defects discovered in said equipment, so that plaintiff could give the necessary orders to have them repaired..” (Finding of Fact No. 5; Tr. 34-35).

The trial court further erred in finding:

“Defendant breached its said contract in this, to wit: In making the test on the starboard lifeboat and its equipment, defendant discovered that the said equipment was defective, faulty and dangerous, in that the swivel link could slip out and become disconnected from the said hook even when the releasing gear was locked, thus permitting that end of the boat to fall, but did not report said dangerous defect to plaintiff, nor take any steps whatever to correct it.” (Finding of Fact No. 6; Tr. 35).

The trial court further erred in finding:

“Plaintiff did not know of and had no reason to suspect the existence of said defect.” (Finding of Fact No. 7; Tr. 35).

ARGUMENT

The first and second specifications of error both deal with the same problem, what were defendant's duties, if any, in regard to the defect and the third specification,

knowledge, is intertwined. For this reason the argument on the three specifications is combined.

It is uncontradicted that about April 6, 1955, after Albina had started to work on JAVA MAIL, Mr. Toole, the port engineer for American Mail, told Mr. Bailey, the ship repair superintendent for Albina, words to the effect that the Coast Guard wanted to weight test the lifeboats and would Albina take care of this.

After the accident, American Mail drew up the following specification:

WEIGHT TESTING—PORT AND STARBOARD LIFEBOATS AND EQUIPMENT. Furnish weight, 165# per person for 66 person capacity and accomplish weight test of each of the port and starboard lifeboats, cables, davits, etc. NOTE: To be accomplished to satisfaction of U.S.C.G."

Plaintiff contends, and apparently the trial court found, that the contract between American Mail and Albina was that Albina was to make the test on the lifeboats, the cables, davits, etc., and determine whether or not the lifeboats and equipment passed the weight test. (Pretrial Order; Tr. 28-29; Contentions of Plaintiff). Plaintiff further contended that as a part of conducting said weight test, Albina had the contractual duty to inspect the lifeboat equipment for defects, report any defects found and repair the defects found (Pretrial Order; Tr. 29-30). The Findings of Fact are framed broadly; however, the trial court did find, or more accurately conclude as a matter of law, that Albina was obligated under its contract to make the weight test, and as a part thereof, to report defects found so American Mail could order such defects repaired.

It seems obvious to the appellant, and the appellant so contends, that weight testing was the function of the U.S.C.G. and that all Albina was to do was to get the sand, put it in the lifeboat and, when the Coast Guard was finished, take it off. The conducting of the weight test and inspection of the lifesaving equipment, as well as the rest of the annual inspection, was conducted by the Coast Guard under the provisions of 46 USCA Sec. 391 which provides that the Coast Guard shall inspect once each year the hull of every steam vessel and "determine to its satisfaction that every such vessel so submitted to inspection * * * is in a condition to warrant the belief that she may be used in navigation with safety to life." Pursuant to this statute, the Coast Guard promulgated rules and regulations for cargo and miscellaneous vessels (Plaintiff's Ex. 1; a portion is printed on Tr. 119-120). Section 91.25-5 provides:

"The annual inspection will only be made upon the written application of the master, owner or agent of the vessel on Form CG-833, to the Officer in Charge, Marine Inspection * * *."

Section 91.25-10 provides:

"The inspection shall be such as to insure that the vessel as regards the * * * lifesaving appliances * * * is in satisfactory condition and fit for the service for which it is intended, and that it complies with the applicable regulations for such vessel, * * *."

Section 91.25-15, lifesaving equipment, provides:

"(a) At each annual inspection, the inspector shall conduct the following tests and inspections of lifesaving equipment.

"(a)(2) If practicable, each lifeboat shall be lowered to near the water and then be loaded with its

allowed capacity, evenly distributed throughout the length, and then be lowered into the water until it is afloat, and be released from the falls. In making this test, persons or deadweight may be used. The total weight used shall be at least equal to the allowed capacity of the lifeboat considering persons to weigh 165 pounds each."

Section 91.25-15, lifesaving equipment, further provides for particular inspections by the inspector of life preservers, winch electrical control apparatus and "all other items of lifesaving equipment."

As Capt. Endresen, the Coast Guard inspector, testified, he was the inspector referred to in the above-quoted regulations (Tr. 96-97). The statutes requires that the Coast Guard conduct the tests and make the inspections. All the ship repairer or the ship's personnel do is to furnish the means for conducting the test or make the equipment open or available so the inspection can be made. Albina's contract certainly did not call for any inspection of the equipment to be tested or the making of any tests and the whole record makes it seem fairly apparent that American Mail was not relying upon Albina to conduct any tests or make any inspections. A review of the specifications, Supplement No. 1, indicates many items concerning the lifeboats which American Mail specifically requested Albina to perform and the reason for the request was that the Coast Guard required it (Pltfs. Ex. 3). An example of this is an item found on page 3 of Supplement No. 1 stating:

"RUDDER—STARBOARD LIFEBOAT Unbolt, repair and re-bolt the one (1) faulty starboard lifeboat rudder. NOTE: requested by U.S.C.G."

The purpose of the weight test was not to determine whether or not the releasing gear was working correctly.

Capt. Endresen stated:

"The weight test is an annual test conducted to find out if the davits, falls, blocks and so on are strong enough to stand the weight of the boat and equipment, the number of persons times 165 pounds, which gives the total weight of the boat when loaded, fully loaded."

Probably the inspection of the releasing gear and its appurtenances would fall under that provision of the regulations providing that all other items of lifesaving equipment shall be examined by the Coast Guard inspector.

Mr. Toole, the representative of American Mail, knew that Albina was not required under their contract to make the weight test and was not required to make any inspection of the lifeboat. He stated:

"Q. As the Port Engineer, do you consider it the duty of the repair yard in conducting a weight test—not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the ring to become disengaged when it is resting in the water?

A. No, their responsibility is to report anything they do see wrong to me." (Tr. 219).

Albina's contract with American Mail in regard to the weight testing did not contemplate conducting a test, or making an inspection or examination for defects.

Having no duty to test, examine or inspect, the question is then raised, did Albina have any duty to report to American Mail the fact that Stene observed that the

ring from the falls, when on slack, could be passed under the hook despite the presence of the guards or keepers. It is the appellant's contention that Albina did not have such a duty, and that such duty could neither be implied as a part of the contract Albina had with American Mail, nor was it a duty implied in law.

Section 403, Restatement of the Law, Torts, Negligence, states:

"One, who as an independent contractor, makes, rebuilds or repairs a chattel for another and turns it over to the other knowing that his work has made it dangerous for the use for which it is turned over is subject to liability as stated in Sections 388 to 390."

The above-quoted language, of course, is not applicable to the present case as the plaintiff, as shall be stated in more detail later on, has virtually dropped the claim that Albina created the dangerous condition, and the trial court did not so find. This particular section, however, has a statement that is applicable. The Institute stated at the end of the comments concerning the above-quoted Section 403 as follows:

"Caveat: The Institute expresses no opinion that a contractor, who fails to exercise reasonable care to inform his employer of a dangerous condition, which he is not employed to repair, but which he discovers in the course of making the repairs agreed upon and of which he realizes that his employer is unaware, may not be subject to the liability stated in this Section."

Paraphrasing the above quotation, the Institute is not taking a position upon the liability in a situation in which a contractor has not contracted to perform repairs

on a certain device, but in the course of making repairs upon other equipment of the employer, he discovers a dangerous condition in the device, which he knows the employer is not aware of, and fails to report the dangerous condition in the device.

The present set of facts differs from the facts set out in the above caveat in one aspect.

The caveat conditions its statement upon a dangerous condition "of which he (independent contractor) realizes that his employer is unaware." Clyde Toole, the port engineer for American Mail at the time, stated:

"Q. Was that condition that you saw there, Mr. Toole, one that was quite open and apparent when you looked for it?

A. When you looked for it, yes, it was very apparent that it would fall out.

* * *

Q. Am I correct, Mr. Toole, that anybody that looked at this hook, ring and guard would see that the guard was in such a position or the ring was of such size that you could slip it out despite the guard being there?

A. It was apparent that that would occur, yes." (Tr. 55-56).

John Stene, Albina employee who noticed that the ring could slip out over the hook, stated that he had noticed the condition "When I first stepped in the boat at the boat deck and rode the boat down." (Tr. 64). Stene further stated:

"Q. You realized that this was really a defect in the equipment, didn't you?

A. Well, I have seen on shipboard a lot of life-boats with the same hook-up. The only thing you

have to watch there is that first you take it up so you get your lines taut and then you proceed—your link should be right up in the bight of that hook, and the line will be tight.” (Tr. 63).

With this testimony it cannot be found that Albina could believe that American Mail was unaware of this condition. It was open and apparent.

The problem raised by the caveat was discussed by the Supreme Court of Pennsylvania in *Wissman vs. General Tire Co. of Philadelphia*, 327 Pa. 215, 192 Atl. 633 (1937). The facts in this case were that the defendant tire company equipped a truck with new tires. One of the rims and the lock ring of the rim were cracked. The defendant tire company noticed the defect and informed the driver of the company owning the truck. Three days later the company took its truck to White Truck Company for a brake adjustment and while a White employee was removing the wheel, the employee was injured when the lock ring burst by reason of the defect.

The Court stated:

“Under the circumstances of the present case, the most that could possibly be required of the defendant was notice to the owner of the vehicle of the defective condition. Indeed, it may well be that a contractor employed to make repairs is under no duty to inform his customer of a dangerous condition which he has not been employed to repair but which he discovers in the course of making repairs agreed upon.”

The relationship of the parties was different in *Weinfeld vs. Caplan*, 282 N.Y. 348, 26 N.E. 2d 287 (1940), but the decision on the duty to warn is applicable. In

this case the landlord agreed to have certain heating work done on the premises and the tenant to have the painting done. The plaintiff was doing the painting and:

“Employees of the heating-contractor removed the cover from a register in the floor over the hot-air furnace and the plaintiff fell through the unguarded opening and was hurt * * *. When the register grating was removed, the plaintiff was away from the premises on an errand. In his absence, the tenant came to the premises and saw the hole theretofore made in the floor by the employees of the heating contractor. Before the plaintiff returned, the tenant had left the premises and was not there when the accident occurred. Under those circumstances the plaintiff, we think, had no right to complain of the mere failure of the tenant to warn him against the possibility of a continuance of the condition created by the independent heating-contractor on property controlled by the landlord.”

A case in this Court, arising in the District Court in Oregon, *Ove Tysko vs. Royal Mail Steam Packet Co.*, 81 F. 2d 960 (1936), involved the same general problem of when a notice or warning of a defective condition is necessary. In that case, a portion of the hatch was open and covered with dunnage. The plaintiff was a longshoreman employed by the stevedore and he fell through the opening in the hatch. The court said at Page 962:

“In 45 C.J. 877, it is said: ‘The general rule is that, where proper notice or warning is given, defendant is relieved from liability for injuries received by those who do not heed it, unless disregard thereof is invited, or acquiesced in, by defendant. * * *’ See also, *Seas Shipping Co. vs. Ward* (CCA 9) 22 F. 2d 251, 252. Because appellant had actual notice of the danger, appellee was not required to give notice or warning. 45 C.J. 876.”

In the case just above-quoted, the court found that the longshoreman had actual notice of the condition. The evidence in the present case is such that there is a reasonable inference that American Mail, through its employees, probably knew of this condition. In any event, they certainly should have known of its existence. The condition had existed for some time (Tr. 81); the condition was obvious (Tr. 55-56).

A general statement of the rule as to when warning of defect must be given is stated in *Atlantic Coast Line vs. Anderson*, 221 F. 2d 548, 553 (CA 5th), reversed on other grounds 350 U.S. 807; 76 S. Ct. 60:

"The law is well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so."

As shown previously, Albina had no contractual duty to inspect or warn of any defective condition. Albina also had no duty implied in law to warn of any condition found, particularly when the condition was open and obvious, had existed for a substantial period of time, and appeared to be a condition that was well known to American Mail.

FOURTH SPECIFICATION OF ERROR

The trial court erred in finding (and in effect concluding as a matter of law) that:

"Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect." (Finding of Fact No. 9; Tr. 36).

ARGUMENT

As regards the two injured men, Nelson and Yee, American Mail was culpable. The basis of culpability is not clear. American Mail alleged in its amended complaint (Tr. 21-22):

“The liability of plaintiff to said Benjamin E. Nelson arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, * * *.”

In the pre-trial order (Tr. 30), the agreed facts simply state:

“That under the admiralty and maritime law and the Jones Act, plaintiff was liable to Nelson and Yee, not only in damages, but for their maintenance and cure, * * *.”

The trial court, on the basis of nothing but the pleadings and the pre-trial order found (Tr. 36):

“The said two men (Nelson and Yee) commenced actions at law in the state court, which were removed to the United States District Court for Oregon, to recover damages for their said injuries because of the unseaworthiness of the said lifeboat, * * *.”

It is an obvious error that the findings state the actions were removed to the United States District Court. They remained in the state court and were not removable. This is partially substantiated by the language in the releases (Tr. 191). There is nothing in the evidence on which the court could find either that the sole basis of recovery was unseaworthiness or that it was something else.

American Mail Line was clearly negligent in two respects: (1) In permitting this defect to exist when the

plaintiff either knew, or because of the existence of the defect over a period of time, should have known existed. (2) In permitting the two injured persons to enter and remain in the lifeboat without inspecting the falls, which inspection would have readily shown the danger. The facts concerning these two charges of negligence made by Albina in the pre-trial order (Tr. 31) were not in controversy. It is not a factual question that is in controversy. The only issue here is whether or not the trial court erred in concluding that the admitted facts did not amount to negligence.

The condition of the ring, hook and keepers was open and obvious to American Mail Line (Tr. 55-56). This condition did not appear to be of recent origin as the parts had not been twisted or bent (Tr. 81).

American Mail Line, under the Jones Act, had a duty to provide a safe place to work and safe appliances with which to work for Nelson and Yee; *Kunschman vs. U.S.*, 54 F. 2d 987 (CA 2nd, 1932). This duty under the Jones Act was to use due diligence to provide such a safe place; *The Cricket*, 71 F. 2d 61 (CA 9th, 1934). Due diligence is not shown when the vessel operator knows or should know of the existence of a defective condition and an unsafe place to work. *Waller vs. N.P. Terminal Co. of Oregon*, 178 Ore. 274, 166 P. 2d 488 (1946); Cert. denied 329 U.S. 742, 67 S. Ct. 45.

There is no factual controversy, American Mail as a matter of law knew or should have known of the condition of the ring, hook and keepers. In not correcting this condition or warning Nelson and Yee of this condition,

American Mail is negligent, both under the common law and under the Jones Act.

American Mail Line initially charged that Stene and Becvar, Albina's employees in the lifeboat, did not properly insert the ring over the hook when they left the boat (Tr. 18, 30). During the trial, counsel for American Mail conceded that Albina probably did not leave the ring and hook improperly emplaced (Tr. 112). The trial court did not find that Albina improperly emplaced the ring and hook when they hooked up to the falls the last time and left the lifeboat.

The testimony is that just before the boat fell the ring from the fall was balancing on the point of the hook (Tr. 128). The testimony also was that the ring would remain in its proper place in the hook as long as tension was thereafter kept on the falls (Tr. 211). American Mail's testimony was that there was tension on the falls from the time the boat was lifted out of the water soon after Albina left until the accident (Tr. 211-212), including the period during which the boat was in its cradle and gripped in (Tr. 126, 156). Certainly there was heavy tension (two ton) (Tr. 156) on the falls from the time it was swung out from its cradle until the accident. Hinrichs was ordered into the boat by Patterson, the mate, just after the boat was swung out from the cradle (Tr. 126-127). According to the testimony and the laws of physics, the ring must have been riding the point of the hook when the boat was swung out of its cradle. The most reasonable inference is that the ring slipped out of its correct position in the hook while the boat was

on the water after the Albina men had left it. The boat was bobbing in the water and was brought up later by the ship's crew (Tr. 61, 63).

In any event, when the lifeboat was swung out from its cradle and at the time Nelson got in and later Yee, the ring was riding the point of the hook; a most dangerous condition. This condition was most obvious; Hinrich and Flovik both saw it without any detailed inspection (Tr. 128, 189). Patterson or anyone to whom he delegated the job could have seen it by casual inspection. Patterson testified that he didn't have to inspect this type of releasing gear (Tr. 162, 174). Capt. Dopp, on the other hand, stated it was the duty of the person in charge of the boat to see that it was properly hooked up and a sailor stationed at the fore and aft falls with the duty of seeing that it was properly hooked up and the falls clear (Tr. 107).

The testimony of the mate and Capt. Dopp was immaterial. Whether or not inspection of equipment, here the lifeboat hook-up, was required of the vessel operator is not a factual question. The law requires a vessel operator to make a reasonable inspection of equipment to be used by the crew and a failure to make such inspection is a violation of the Jones Act and negligence as a matter of law. How careful an inspection should be made could be a fact question, but here it cannot be because a most casual inspection would have revealed the condition.

Judge Learned Hand and the court in *Vanderlinden vs. Lorentzen*, 139 F. 2d 995 (CA 2nd, 1944), were con-

cerned with the problem of inspection and indemnity. In that case a "business visitor" brought an action for injuries against the ship operator and the stevedore. The stevedore sought indemnity from the ship owner. The plaintiff was injured when a rope ladder broke. The ladder was ship's gear, but it was put over the ship's side by the stevedore. The stevedore did not inspect the rope ladder, which ladder was rotten, claiming that it was not customary for the stevedore to make such inspection. The court held that the stevedore did have a duty to a business visitor to inspect the rope ladder. The trial court charged the jury in regard to the stevedore's liability:

"If 'an ordinary look at the coil ladder * * * would have put a reasonable man on notice that the ladder was defective' that would charge the stevedore. But if the 'defect would not be apparent on an ordinary looking at it,' they were to 'consider the evidence of custom * * * that stevedores always accept the ladder as they get it * * * and merely * * * drop it overside.' "

The appellate court stated:

"Such an acceptance might not be reasonable; the custom was not final; in the end they must decide what degree of inspection was reasonable care. * * * We hold that both defendants were under a duty to use reasonable care to see that the plaintiff had a safe approach to the deck of the lighter: i.e., that the ladder is safe * * * a custom exonerating the stevedore from all need of examining a ladder down which its employees or 'business visitors' must descend, would be so 'unreasonable' as to be unlawful without more. The jury might disregard it altogether; indeed the Judge could probably have done so himself. Prima facie, therefore, the defendants were joint tort feasons, since each failed to inspect the ladder as his duty demanded. As such, under

well settled law, there could be no indemnity between them. * * * If that was the custom of stevedores (not to inspect the rope), it was a unilateral custom, which did not charge the ship owner; indeed, it was so wantonly reckless that only the plainest possible evidence should charge the ship owner with notice of it. He might rightly assume that the stevedore would make at least some inspection, and some inspection was indeed inevitable, for the stevedore could not use the ladder at all, without at least looking over the side to see if it was long enough to reach the lighter, or so long as to double on the deck. That much scrutiny would alone at once have disclosed the unfitness of the ladder at bar, whose ropes had in places been frayed so much as to be hardly more than string. The doctrine that there may not be indemnity between joint tort feasons is certainly desirable in a case like this, where the stevedore's fault was so much the greater of the two. It would be shocking to hold that the stevedore's 'reliance' on the ladder furnished was 'justifiable', and so to throw the whole loss on much the less reprehensible of the two wrong-doers."

This Court, in a case arising in the District of Oregon, has inferentially held the same as far as inspection is concerned. In *Kulukundis vs. Strand*, 202 F.2d 708 (CA 9th, 1953), the defect was that the hatch cover flanges were bent so that the hatch covers and strong backs did not firmly fit. A hatch cover dislodged and the libellant longshoreman fell into the hole. This Court stated:

"The nature of the accident was similar to that in *The Redjacket*, D.C.E.D. Pa. 1900, 110 F. 224, where as here the strong back 'sprung out of line.' The Court said: 'It seems to me an irresistible inference that, if the hatch had been inspected, the defect would have appeared; and, certainly, if the

defect had thus become known, as no attempt was made to remedy it, the negligence of the ship could scarcely be denied.' 110 F. at Page 226. This reasoning is equally applicable to the present case."

This Court passed upon a somewhat similar situation recently in another case in the District of Oregon, *Wiel Amundsen vs. Cotter*, 228 F.2d 351 (CA 9th, 1955). As the Court stated:

"The District Court held that the Shipowner was negligent in failing to make tight a removable rod, a part of a fencing railing above the deck just forward of the open forehold, also making the vessel unseaworthy in that respect, * * *."

There simply could be no question but that the shipowner is negligent as a matter of law if, as to its employees, it fails to make any inspection of a device or appliance, such as the hook-up on a lifeboat.

FIFTH SPECIFICATION OF ERROR

The trial court erred in making the following conclusion of law:

"The Court concludes that the defendant breached its contract with the plaintiff, and that as a result of said breach said plaintiff was damaged in the sum of \$50,045.01, with interest at 6% per annum from December 5, 1955, on \$41,871.01, and from July 3, 1956, on \$8,174." (Tr. 37)

ARGUMENT

The court's conclusion that the defendant breached its contract has already been argued under First and Second Specifications of Error.

The court at no place directly concludes that American Mail Line is entitled to indemnity from Albina Engine & Machine Works, Inc. However, inasmuch as indemnity is the only basis on which plaintiff sought recovery, the court does conclude that the plaintiff is entitled to indemnity.

The appellant has pointed out in the argument in the past Specifications of Error that Albina was not guilty of any fault, either negligence or breach of contract and, therefore, it would not be liable to the plaintiff in indemnity. However, even if the assumption was made that Albina was at fault, American Mail is certainly not entitled to indemnity because it also had breached a duty it owed to injured crew members.

This Court has had several occasions in the recent past to take up this problem of indemnity. The basis of the doctrine was stated in *Amerocean S.S. Company, Inc. vs. Copp*, 245 F.2d 291 (CA 9th, 1957). The Court at page 294 stated:

“When two parties, jointly and concurrently, breach the duty each owes to a third person and damage results to him, each is liable to the full extent therefor. Each had committed a wrongful act. Both are equally guilty of wrongful conduct. But one of such guilty parties has no right of indemnity or contribution from the other, if he has been held responsible in damages to the injured party. He cannot take advantage of his own wrong on the ground that the other is equally guilty. This doctrine is well established at common law and is followed in admiralty.”

American Mail Line did breach a duty it owed the two injured men; it was guilty of wrongful conduct. It

so admitted in the pre-trial order (Tr. 30), and, of course, it paid the two injured workmen a total of \$41,750.00 in settlement of the damage claims. American Mail Line here has been guilty of negligence and is certainly not entitled to indemnity. Even if their only breach of duty was failure to furnish a seaworthy vessel, American Mail still would not be entitled to indemnity. The court in the *Amerocean* case stated:

“The doctrine that the stevedore is liable in an indemnity action where the liability of the shipowner is established solely upon the grounds of unseaworthiness, while there is a finding of active negligence on the part of the stevedore, has been accepted in many Federal courts. The best considered decisions, however, limit the theory to a case where it is found on the facts that the duty existed on the stevedore to protect his employees from a highly dangerous appliance or condition, and the breach of such duty was the sole proximate cause of the injury.”

This is not a case in which the ship repairer had a duty to its own employees to protect them from highly dangerous appliances or conditions, and certainly even if there was a breach of duty on the ship repairer's part, it was not the sole and proximate cause of the injury to Nelson and Yee.

Some of the principal recent cases on indemnity between a ship and a ship repairer or a ship and a stevedore are as follows:

Halcyon Lines, et al vs. Haenn Ship Sealing & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277; facts in 89 F.S. 765 (D. Ct. E.D. Pa.). The stevedore previously installed “grain feeders” and the ship contracted with

the ship repairer to make the grain feeders "grain tight." Bacille, an employee of the ship repairer, went to work on staging, which was a part of the grain feeder installed by the stevedore. The staging collapsed, injuring Bacille. The ship settled with Bacille and instituted an indemnity or contribution suit against the ship repairer. The jury found the repairer 75% negligent and the ship 25% at fault. The trial court only discussed the negligence of the repairer which consisted of failure to inspect the condition of the cleats holding the staging and performing the work in an unsafe manner by directing Bacille to work on a staging thirty feet above the bottom of the hold when it would have been reasonably possible to work from a rope ladder from above and use a hatch cover to stand on. The United States Supreme Court held that, the ship being at fault in some degree, it could not recover against the repairer.

In *Halcyon*, the defect was created by the stevedore, —here it was created or suffered to occur by the ship. In *Halcyon* the ship ordered the repairer to make general repairs and the repairer failed to inspect the work he was to repair. Here it is denied that the repairer had any duty to repair or inspect, but certainly a failure to report a defect is no more culpable than a failure to inspect and find a defect. The ship here, unlike in *Halcyon*, had a further chance to avoid injury by performing its basic duty of checking the falls before lowering the boat; this the ship did not do and an injury occurred. *Halcyon* could not recover; *a fortiori* American Mail cannot recover.

Hawn vs. Pope & Talbot, Inc., 346 U.S. 406, 74 S. Ct. 202; facts from 198 F.2d 800 (CA 3rd). The repairer was making repairs to the grain feeder on the ship. Hawn was an employee of the repairer. Hawn slipped on loose grain in a poorly lit area of the ship and fell through a place where the hatch covering was missing. The loose grain was put aboard or was caused by the stevedore. The court held that the hatch cover was absent long enough to put the ship on constructive notice of its absence. The jury held both the ship and the repairer negligent and indemnity was denied the ship.

In *Hawn*, the defect of missing hatch boards was negligence because the ship at least should have known of their absence; and that is present here plus the additional present fact that here the defect was created, actively or by sufferance of the ship, whereas that inference is not present in *Hawn*. Certainly the negligence of Pope & Talbot in the *Hawn* case in permitting the slippery condition created by the stevedore to exist and in not having sufficient light was no more culpable than American Mail's failure to inspect the falls before lowering away. Pope & Talbot could not recover indemnity; *a fortiori* American Mail cannot recover indemnity.

Hagans vs. Farrell Lines, 237 F.2d 477 (CA 3rd). The ship furnished a defective winch to the stevedore and the stevedore, knowing the winch was defective, went ahead and used the winch. The ship was held not entitled to indemnity as the ship, like the ship here, created or permitted the defect. The Court said at page 483:

“But if Lavino (stevedore, but would also be applicable to repairer) failed to perform its work properly, we are constrained to uphold that in the face of material violations, Farrell (ship) is not entitled to full indemnity and, of course, it cannot have contribution.”

Amerocean S.S. Company, Inc. vs. Copp, supra. The ship, as did the ship here, created the defect; i.e., treating the deck with a rust preventor which made the deck slippery. Copp, the stevedore, knew of the slippery condition but sent Smith, a longshoreman, out on the deck without warning him and Smith slipped and fell. The ship was held not entitled to indemnity against Copp for the loss suffered by the ship by reason of Smith's injury and ensuing lawsuit. Certainly American Mail was no less culpable than *Amerocean* and, therefore, American Mail, on the basis of the *Amerocean* case, is not entitled to indemnity.

The doctrine of indemnity, both express or implied, as it is sought in this case, has taken many twists and turns in the last ten to fifteen years. It now appears that it is back to the basic principles as expressed in *Union Stockyard Company of Omaha vs. Chicago, Burlington & Quincy R. R. Co.*, 196 U.S. 217, 25 S. Ct. 226 (1905). In this case the railroad delivered a refrigerator car to the plaintiff stockyards. The car had a defect when it was delivered and the defect was one which the plaintiff could have found on reasonable inspection; similarly it could have been found by the stockyards on reasonable inspection. The plaintiff stockyards sent one of its employees in the car and the employee was injured by the defect and sued the stockyards and re-

covered. This was an implied indemnity suit by the stockyards against the railroad. A unanimous court denied indemnity and stated:

"In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

"In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

Certainly the conduct of the ship here arose to no higher standard than the conduct of the stockyards, yet the stockyards was denied indemnity and so should the ship here be denied indemnity.

CONCLUSION

The appellant respectfully submits that the findings of fact and conclusions of law of the trial court are clearly erroneous in that the defendant-appellant, Albina Engine & Machine Works, was not guilty of a breach of contract or guilty of negligence and, therefore, no recovery can be had against it. In addition, even if

Albina were guilty of some fault, the ship operator, American Mail Line, is guilty of negligence, as well as failing to furnish a seaworthy vessel, both of which caused the injuries to the seamen and, therefore, American Mail Line, a tortfeasor, cannot recover indemnity against Albina Engine & Machine Works.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, DENECKE
& KINSEY,

By ARNO H. DENECKE,
Attorneys for Appellant.

APPENDIX

Exhibits identified and authenticity admitted in Pre-trial Order (Tr. 32).

Plaintiff's exhibits as listed in the Pretrial Order, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and defendant's Nos. 10 and 11 were received (Tr. 44).

No. 15829

United States
Court of Appeals
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

JAN 31 1958

PAUL P. GIBBEN, CLERK

No. 15829

United States
Court of Appeals
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Appellant,
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Transcript of Record

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NAMES AND ADDRESSES OF ATTORNEYS

MAUTZ, SOUTHER, SPAULDING, DENECKE
& KINSEY,

ARNO H. DENECKE,

Board of Trade Building,
Portland 4, Oregon,

For Appellant.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,

1310 Yeon Building,
Portland 4, Oregon,

For Appellee.

In the District Court of the United States
for the District of Oregon

No. Civil 8459

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, a
corporation, Defendant.

COMPLAINT

The plaintiff, American Mail Line, Ltd., for cause of action against defendant, Albina Engine & Machine Works, Inc., alleges as follows:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware.

II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

III.

This is a civil action and the amount in controversy is in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

Heretofore plaintiff and defendant entered into a contract for the performance by defendant of certain repairs, tests and inspections on plaintiff's

steamship *Java Mail*, in accordance with certain specifications dated April 1, 1955, one of which provided as follows:

“Weight Testing — Port and Starboard Life Boats and Equipment. Furnish weight, 165# per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard life boats, cable, davits, etc. * * *”

V.

Defendant negligently performed and breached said contract in that it did not properly perform the test on defendant's starboard lifeboat, and particularly that it—

(1) Did not properly inspect the connecting swivel link between the davit falls and the connecting hook on one end of the starboard lifeboat;

(2) Did not properly inspect the said hook;

(3) Did not securely fasten the swivel link of the davit falls for said lifeboat into the connecting hook of the boat;

(4) Did not repair the said lifeboat-hook or the said connection between it and the falls, so as to prevent an accidental parting;

(5) Did not inspect the releasing gear to determine whether it would prevent said swivel ring from coming out of the said hook;

(6) Did not repair said releasing gear to prevent the said ring from coming out of the hook;

(7) Did not warn defendant that the hook was in such condition that the said link might become disconnected therefrom;

(8) Made the connection between the davit falls and the hook so insecurely and improperly that during life-boat drill immediately after said test when the boat was being lowered the said link came out of the hook and allowed the life-boat to be precipitated into the water below.

VI.

As a result of defendant's breach of said contract as above alleged, the lifeboat, during said life-boat drill, was violently precipitated into the water below and a seaman, Benjamin E. Nelson, who was rightfully in said boat in the course of his employment, was severely injured, suffering the loss of one leg below the knee, and other serious injuries. The accident happened on April 7, 1955.

VII.

The said Benjamin E. Nelson sued this plaintiff, American Mail Line, Ltd., in the Circuit Court of the State of Oregon for the County of Multnomah on account of said injuries, and to recover damages therefor, in the sum of \$95,000.00 and other special damages, and this plaintiff settled said suit, after due notice to defendant Albina Engine & Machine Works, Inc., that it intended to do so, for the sum of \$35,000., and said notice notified said Albina that this plaintiff intended to seek recovery over from said Albina Engine & Machine Works, Inc., by way of indemnity; which notice was ignored. Plaintiff, on December 5, 1955, paid the said sum of \$35,000.00 to said Nelson as agreed in said settlement.

VIII.

Plaintiff also paid to said Nelson various sums for maintenance and cure, which sums were due to Nelson under the maritime law, on account of said injuries. Said sums were paid for a period from May 4th, 1955, to November 30, 1955, 211 days at the rate of Eight Dollars (\$8.00) a day, and totaled the sum of \$1688.00.

IX.

The liability of plaintiff to said Benjamin E. Nelson arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, and the liability to pay maintenance and cure arose under the general maritime law, but all of said liabilities were occasioned and brought about by the breach of said contract by defendant Albina Engine & Machine Works, Inc., as above alleged, and plaintiff seeks recovery over and indemnity from said Albina Engine & Machine Works, Inc., for the amount so paid in settlement of its said liabilities.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$36,688.00, with interest thereon from December 5, 1955, until paid, together with its costs and disbursements herein.

WOOD, MATTHIESSEN, WOOD
& TATUM,

/s/ ERSKINE WOOD,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed Feb. 6, 1956.

[Title of District Court and Cause No. 8459.]

ANSWER

In answer to plaintiff's complaint the defendant admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I, II and III of plaintiff's complaint.

II.

Admits that the parties entered into a contract with the performance by the defendant of certain work on the plaintiff's steamship Java Mail in accordance with certain specifications but denies each and every other allegation of Paragraph IV and the whole thereof.

III.

Denies the allegations of Paragraph V of plaintiff's complaint.

IV.

Admits that the lifeboat referred to in plaintiff's complaint, during the lifeboat drill, fell into the water below and seaman Benjamin E. Nelson who was in said lifeboat was injured and suffered the loss of one leg below the knee and that said accident happened on April 7, 1955 but denies each and every other allegation of Paragraph VI and the whole thereof.

V.

Admits that said Benjamin E. Nelson sued the plaintiff in the Circuit Court of the State of Oregon for the County of Multnomah on account of inju-

ries alleged to be incurred in said accident and that plaintiff settled said suit and that after notice to the defendant of its intention to settle said case for the sum of \$35,000, settled said case with the said Benjamin E. Nelson but the defendant denies each and every other allegation of Paragraph VII and the whole thereof.

VI.

Defendant has no information or belief as to the allegations of Paragraph VIII and therefore denies the same.

VII.

The defendant denies the allegations of Paragraph IX and the whole thereof.

Wherefore, defendant prays for judgment herein.

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,

/s/ By ARNO H. DENECKE,
Of Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 9, 1956.

In the United States District Court
for the District of Oregon

No. 8787

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Defendant.

COMPLAINT

The plaintiff, American Mail Line, Ltd., for cause of action against defendant, Albina Engine & Machine Works, Inc., alleges as follows:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware.

II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

III.

This is a civil action and the amount in controversy is in excess of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

IV.

Heretofore plaintiff and defendant entered into a contract for the performance by defendant of certain repairs, tests and inspections on plaintiff's steamship Java Mail, in accordance with certain

specifications dated April 1, 1955, one of which provided as follows:

“Weight Testing — Port and Starboard Life Boats and Equipment. Furnish weight, 165# per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard life boats, cable, davits, etc. * * *”

V.

Defendant negligently performed and breached said contract in that it did not properly perform the test on defendant's starboard lifeboat, and particularly that it—

(1) Did not properly inspect the connecting swivel link between the davit falls and the connecting hook on one end of the starboard lifeboat;

(2) Did not properly inspect the said hook;

(3) Did not securely fasten the swivel link of the davit falls for said lifeboat into the connecting hook of the boat;

(4) Did not repair the said lifeboat-hook or the said connection between it and the falls, so as to prevent an accidental parting;

(5) Did not inspect the releasing gear to determine whether it would prevent said swivel ring from coming out of the said hook;

(6) Did not repair said releasing gear to prevent the said ring from coming out of the hook;

(7) Did not warn defendant that the hook was in such condition that the said link might become disconnected therefrom;

(8) Made the connection between the davit falls

and the hook so insecurely and improperly that during life-boat drill immediately after said test when the boat was being lowered the said link came out of the hook and allowed the life-boat to be precipitated into the water below.

VI.

As a result of defendant's breach of said contract as above alleged, the lifeboat, during said life-boat drill, was violently precipitated into the water below and a seaman, Chan Ting Yee, who was rightfully in said boat in the course of his employment, was injured. The accident happened on April 7, 1955.

VII.

The said Chan Ting Yee sued this plaintiff, American Mail Line, Ltd., in the Circuit Court of the State of Oregon for the County of Multnomah on account of said injuries, and to recover damages therefor, in the sum of \$30,000.00 and other special damages, and this plaintiff settled said suit, after due notice to defendant Albina Engine & Machine Works, Inc., that it intended to do so, for the sum of \$6,750.00, and said notice notified said Albina that this plaintiff intended to seek recovery over from said Albina Engine & Machine Works, Inc., by way of indemnity; which notice was ignored. Plaintiff, on or about July 3, 1956, paid the said sum of \$6,750.00 to said Chan Ting Yee as agreed in said settlement.

VIII.

Plaintiff also paid to said Chan Ting Yee various

sums for maintenance and cure, which sums were due to Chan Ting Yee under the maritime law, on account of said injuries. Said sums were paid for a period from April 14th, 1955, to August 5th, 1955, and amounted to the total sum of \$824.00.

IX.

The liability of plaintiff to said Chan Ting Yee arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, and the liability to pay maintenance and cure arose under the general maritime law, but all of said liabilities were occasioned and brought about by the breach of said contract by defendant Albina Engine & Machine Works, Inc., as above alleged, and plaintiff seeks recovery over and indemnity from said Albina Engine & Machine Works, Inc., for the amount so paid in settlement of its said liabilities.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$6,750.00, with interest thereon from July 3rd, 1956, plus \$824.00, maintenance and cure, together with its costs and disbursements herein.

WOOD, MATTHIESSEN, WOOD
& TATUM,
/s/ ERSKINE WOOD,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed August 30, 1956.

[Title of District Court and Cause No. 8787.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Wood, Matthiessen, Wood & Tatum; Erskine Wood, plaintiff's attorneys, whose address is 1310 Yeon Building, Portland 4, Oregon, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: August 30, 1956.

[Seal] R. DeMOTT,
 Clerk,
 /s/ By M. CASEY,
 Deputy Clerk.

Return on Service of Writ Attached.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause No. 8459.]

COURT'S BLOTTER ENTRY

Order to lodge P.T. Order by Oct. 15, 1956
(then T).

Sep. 10, 1956.

WILLIAM G. EAST.

[Title of District Court and Cause No. 8787.]

ANSWER

In answer to plaintiff's complaint, the defendant admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I, II and III of plaintiff's complaint.

II.

Admits that the parties entered into a contract for the performance by the defendant of certain work on plaintiff's steamship Java Mail in accordance with certain specifications, but denies each and every other allegation of paragraph IV and the whole thereof.

III.

Denies the allegations of paragraph V.

IV.

Admits that the life-boat referred to in plaintiff's complaint, during the life-boat drill, fell into the water and a seaman, Chan Ting Yee, was injured in some respect and that this happened on April 7, 1955, but denies each and every other allegation of paragraph VI.

V.

Admits that said Chan Ting Yee sued the plaintiff, American Mail Line, Ltd., in the Circuit Court of the State of Oregon for the County of Multnomah on account of said injuries and that this plaintiff settled said suit after due notice to the defendant that it intended to do so and the plaintiff noti-

fied the defendant that the plaintiff intended to seek recovery over from the defendant. Defendant denies each and every other allegation of paragraph VII and the whole thereof.

VI.

Defendant has no information or belief sufficient to form an allegation as to the truth or veracity of the allegations of paragraph VIII and, therefore, denies the same.

VII.

Denies the allegations of paragraph IX and denies each and every other allegation of plaintiff's complaint and the whole thereof.

VIII.

For a further and affirmative answer and defense, the defendant alleges that the sole and proximate cause of any loss to the plaintiff was plaintiff's negligence in failing to inspect the position of the connecting swivel link of the davit falls on the connecting hook of the said life-boat before permitting the said Chan Ting Yee to enter said life-boat, and in using a connecting swivel link and life-boat hook which plaintiff knew or should have known was defective.

Wherefore, the defendant prays for judgment herein.

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,

/s/ By ARNO H. DENECKE,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 20, 1956.

[Title of District Court and Cause No. 8787.]

COURT'S BLOTTER ENTRY

July 1956. Monday, October 8, 1956.

East, J. Reporters, Ellis, Clerk, R.D.E.

Order consolidating with Civil 8459 and setting
for P.T.C. on Dec. 3, 1956.

[Title of District Court and Cause No. 8459.]

INTERROGATORIES TO PLAINTIFF AMERICAN
MAIL LINE, LTD., A CORPORATION

Pursuant to Rule 33 of the Federal Rules of
Civil Procedure, the following interrogatories are
to be answered by the plaintiff American Mail Line,
Ltd.:

(1) When was the connecting swivel link, which,
on April 7, 1955, was on the starboard lifeboat falls
of the Java Mail, installed?

(2) Was the Java Mail owned by American Mail
Line, Ltd., on the date given in answer to question
(1)?

(3) Were any repairs made to the connecting
swivel link which was referred to in interrogatory
(1)?

(4) If the answer to interrogatory (3) is yes,
what were the dates of such repairs and the nature
of such repairs?

(5) When was the connecting hook and releasing

gear, including the finger guards, which was on the Java Mail starboard lifeboat falls on April 7, 1955, installed?

(6) Was the Java Mail owned by American Mail Line, Ltd., on the date given in answer to question (5)?

(7) Have any repairs been made to said connecting hook and releasing gear, including finger guards?

(8) If the answer to interrogatory (7) is yes, what were the dates of said repairs and the nature of said repairs?

(9) When did American Mail Line, Ltd., its officers, agents and employees, know that the connecting swivel link would disconnect from the hook without the release of the releasing gear?

(10) At this time will the connecting swivel link still disconnect from the hook without the release of the releasing gear?

(11) When the crew of the Java Mail lowered the starboard lifeboat, at a time just prior to the accident, did any member of the crew, or American Mail Line, Ltd.'s officers or agent or ships officers know that the connecting swivel link would disconnect from the hook without the release?

(12) Did American Mail Line, Ltd., give any notice of any kind, written or oral, to Albina Engine & Machine Works, Inc., prior to the accident here involved that the connecting swivel link would disconnect from the hook without the release of the releasing gear?

(13) If the answer to the last interrogatory is yes, when was such notice given, to whom, and in what form?

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,
/s/ By ARNO H. DENECKE,
Of Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 9, 1956.

[Title of District Court and Cause No. 8787.]

COURT'S BLOTTER ENTRY

November Term, Monday, Dec. 3, 1956.

McColloch, C. J. Reporter, J. B. Deputy, A. N.

Entered order resetting for Pre-trial Conference
on Feb. 4th and Trial on Feb. 12th. Nfd.

[Title of District Court and Cause No. 8459.]

AMENDED COMPLAINT

The plaintiff, American Mail Line, Ltd., for cause
of action against defendant, Albina Engine & Ma-
chine Works, Inc., alleges as follows:

I.

Plaintiff is a corporation organized and existing
under the laws of the State of Delaware.

II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

III.

This is a civil action and the amount in controversy is in excess of \$3,000.00, exclusive of interest and costs.

IV.

Heretofore plaintiff and defendant entered into a contract for the performance by defendant of certain repairs, tests and inspections on plaintiff's steamship Java Mail, in accordance with certain specifications dated April 1, 1955, one of which provided as follows:

“Weight Testing—Port and Starboard Life Boats and Equipment. Furnish weight, 165# per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard life boats, cable, davits, etc . . .”

V.

Defendant negligently performed and breached said contract in that it did not properly perform the test on defendant's starboard lifeboat, and particularly that it—

- (1) Did not properly inspect the connecting swivel link between the davit falls and the connecting hook on one end of the starboard lifeboat;
- (2) Did not properly inspect the said hook;
- (3) Did not securely fasten the swivel link of the davit falls for said lifeboat into the connecting hook of the boat;

(4) Did not repair the said lifeboat-hook, including the safety guards, or the said connection between it and the falls, so as to prevent an accidental parting;

(5) Did not inspect the releasing gear to determine whether it would prevent said swivel ring from coming out of the said hook;

(6) Did not repair said releasing gear to prevent the said ring from coming out of the hook;

(7) Did not warn defendant that the hook was in such condition that the said link might become disconnected therefrom;

(8) Made the connection between the davit falls and the hook so insecurely and improperly that during lifeboat drill immediately after said test when the boat was being lowered the said link came out of the hook and allowed the lifeboat to be precipitated into the water below.

VI.

As a result of defendant's breach of said contract as above alleged, the lifeboat, during said lifeboat drill, was violently precipitated into the water below and a seaman, Benjamin E. Nelson, who was rightfully in said boat in the course of his employment, was severely injured, suffering the loss of one leg below the knee, and other serious injuries. The accident happened on April 7, 1955.

VII.

The said Benjamin E. Nelson sued this plaintiff, America Mail Line, Ltd., in the Circuit Court of

the State of Oregon for the County of Multnomah on account of said injuries, and to recover damages therefor, in the sum of \$95,000.00 and other special damages, and this plaintiff settled said suit, after due notice to defendant Albina Engine & Machine Works, Inc., that it intended to do so, for the sum of \$35,000, and said notice notified said Albina that this plaintiff intended to seek recovery over from said Albina Engine & Machine Works, Inc., by way of indemnity; which notice was ignored. Plaintiff, on December 5, 1955, paid the said sum of \$35,000 to said Nelson as agreed in said settlement, and in connection therewith incurred and paid the reasonable sum of \$1500 as attorney's fees.

VIII.

Plaintiff also paid to said Nelson various sums for maintenance and cure, which sums were due to Nelson under the maritime law, on account of said injuries. Said sums were paid for a period from May 4th, 1955, to November 30th, 1955,—211 days at the rate of \$8.00 a day, and totalled the sum of \$1688.00.

IX.

As a result of the acts and neglects of defendant, hereinbefore alleged, defendant's said starboard lifeboat and its davits, falls and appurtenances were severely damaged and in the repair and renewal thereof and incidental costs plaintiff expended the reasonable sum of \$3683.01, which was a reasonable amount.

X.

The liability of plaintiff to said Benjamin E. Nel-

son arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, and the liability to pay maintenance and cure arose under the general maritime law and the incurrence of said attorney's fees and the costs and expenses of repairing said lifeboat, davits, falls, etc., as alleged, and all of said liabilities were occasioned and brought about by the breach of said contract by defendant Albina Engine & Machine Works, Inc., as above alleged, and plaintiff seeks recovery over and indemnity from said Albina Engine & Machine Works, Inc., for the amount so paid in settlement of its said liabilities, and for said attorney's fees and the said costs and expenses of repairing and renewing the lifeboat, davits, falls and appurtenances as alleged.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$41,871.01, with interest thereon from December 5, 1955, until paid, together with its costs and disbursements herein.

WOOD, MATTHIESSEN, WOOD &
TATUM,
/s/ ERSKINE WOOD,
Attorneys for Plaintiff.

Verification waived and consent to filing of Amended Complaint given.

/s/ ARNO H. DENECKE,
Attorney for Defendant.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause No. 8787.]

AMENDED COMPLAINT

The plaintiff, American Mail Line, Ltd., for cause of action against defendant, Albina Engine & Machine Works, Inc., alleges as follows:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware.

II.

Defendant is a corporation organized and existing under the laws of the State of Oregon.

III.

This is a civil action and the amount in controversy is in excess of \$3,000.00, exclusive of interest and costs.

IV.

Heretofore plaintiff and defendant entered into a contract for the performance by defendant of certain repairs, tests and inspections on plaintiff's steamship Java Mail, in accordance with certain specifications dated April 1, 1955, one of which provided as follows:

“Weight Testing — Port and Starboard Life Boats and Equipment. Furnish weight, 165# per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard life boats, cable, davits, etc . . . ”

V.

Defendant negligently performed and breached said contract in that it did not properly perform the test on defendant's starboard lifeboat, and particularly that it——

(1) Did not properly inspect the connecting swivel link between the davit falls and the connecting hook on one end of the starboard lifeboat;

(2) Did not properly inspect the said hook;

(3) Did not securely fasten the swivel link of the davit falls for said lifeboat into the connecting hook of the boat;

(4) Did not repair the said lifeboat-hook, including the safety guards, or the said connection between it and the falls, so as to prevent an accidental parting;

(5) Did not inspect the releasing gear to determine whether it would prevent said swivel ring from coming out of the said hook;

(6) Did not repair said releasing gear to prevent the said ring from coming out of the hook;

(7) Did not warn defendant that the hook was in such condition that the said link might become disconnected therefrom;

(8) Made the connection between the davit falls and the hook so insecurely and improperly that during lifeboat drill immediately after said test when the boat was being lowered the said link came out of the hook and allowed the lifeboat to be precipitated into the water below.

VI.

As a result of defendant's breach of said contract as above alleged, the lifeboat, during said lifeboat drill, was violently precipitated into the water below and a seaman, Chan Ting Yee, who was rightfully in said boat in the course of his employment, was injured. The accident happened on April 7th, 1955.

VII.

The said Chan Ting Yee sued this plaintiff, American Mail Line, Ltd., in the Circuit Court of the State of Oregon for the County of Multnomah on account of said injuries, and to recover damages therefor, in the sum of \$30,000.00 and other special damages, and this plaintiff settled said suit, after due notice to defendant Albina Engine & Machine Works, Inc., that it intended to do so, for the sum of \$6,750.00, and said notice notified said Albina that this plaintiff intended to seek recovery over from said Albina Engine & Machine Works, Inc., by way of indemnity; which notice was ignored. Plaintiff, on or about July 3rd, 1956, paid the said sum of \$6,750.00 to said Chan Ting Yee as agreed in said settlement, and in connection therewith incurred and paid the reasonable sum of \$600.00, attorney's fees.

VIII.

Plaintiff also paid to said Chan Ting Yee various sums for maintenance and cure, which sums were due to Chan Ting Yee under the maritime law, on account of said injuries. Said sums were

paid for a period from April 14th, 1955, to August 5th, 1955, and amounted to the total sum of \$824.00.

IX.

As a result of the acts and neglects of defendant, hereinbefore alleged, defendant's said starboard lifeboat and its davits, falls and appurtenances were severely damaged and in the repair and renewal thereof and incidental costs plaintiff expended the reasonable sum of \$3,683.01, which was a reasonable amount.

X.

The liability of plaintiff to said Chan Ting Yee arose under what is known as the Jones Act, for failure to furnish a safe place to work, and other causes actionable under said Act, and the liability to pay maintenance and cure arose under the general maritime law and the incurrence of said attorney's fees and the costs and expenses of repairing said lifeboat, davits, falls, etc., as alleged, and all of said liabilities were occasioned and brought about by the breach of said contract by defendant Albina Engine & Machine Works, Inc., as above alleged, and plaintiff seeks recovery over and indemnity from said Albina Engine & Machine Works, Inc., for the amount so paid in settlement of its said liabilities, and for said attorney's fees and the said costs and expenses of repairing and renewing the lifeboat, davits, falls and appurtenances as alleged.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$11,857.01, with interest

thereon from July 3rd, 1956, until paid, together with its costs and disbursements herein.

WOOD, MATTHIESSEN, WOOD &
TATUM,

/s/ ERSKINE WOOD,

Attorneys for Plaintiff.

Verification waived—consent given to file amended complaint.

/s/ ARNO H. DENECKE

Of Attorneys for Defendant.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

PRETRIAL ORDER

These cases are by the consent of the parties and order of the Court consolidated for trial.

Agreed Facts

Plaintiff is a corporation organized and existing under the laws of the State of Delaware. Defendant is a corporation organized and existing under the laws of the State of Oregon. These are civil actions and the amount in controversy in each is in excess of \$3,000, exclusive of interest and costs.

Heretofore defendant, at the instance and request of plaintiff, performed certain work in making a lifeboat test of the starboard lifeboat of plaintiff's ship, the Java Mail. After defendant had finished its work, the boat was lifted and swung into its cradle on the boatdeck. Shortly thereafter a life-

boat drill was held by the crew of the ship and this lifeboat was partially lowered toward the water, with some members of the crew in it, and part way down, the after end of the lifeboat became detached from the "fall" holding it, and the boat with the men in it was precipitated into the water and two of the men, viz., Benjamin E. Nelson and Chan Ting Yee were injured, Nelson losing a leg as a result and suffering other injuries. Nelson and Yee sued American Mail Line and this defendant for their injuries, but later took a voluntary nonsuit as to this defendant, and American Mail Line, after first notifying defendant Albina Engine & Machine Works through its attorney that it was about to do so, and would hold said defendant liable by way of indemnity, settled the Nelson case for \$35,000, and the Yee case for \$6750.

These present cases are brought to recover those and other expenses which plaintiff incurred from defendant by way of indemnity or damages for breach of its contract.

Contentions of the Plaintiff

Plaintiff contends and defendant denies that said lifeboat test was done by defendant under a certain contract between plaintiff and defendant (Exhibit ——), the material part of which reads as follows:

“Weight Testing — Port and Starboard Life Boats and Equipment

Furnish weight, 165# per person for 66 persons capacity, and accomplish weight test of

each the Port and Starboard life boats, cable, davits, etc. Note: To be accomplished to satisfaction of U.S.C.G.”

and was to be accomplished pursuant to Coast Guard Rules & Regulations for Cargo and Miscellaneous Vessels, then in force, and particularly Regulation 91.25-15 of the issue of November 19, 1952.

Plaintiff contends that at the after end of said lifeboat was a hook attached to the boat, the purpose of which was to receive a link or ring attached to the davit falls, and thus permit the boat to be raised or lowered, and that there were two “finger guards” as appurtenances to said hook, the purpose of which was to prevent the link or ring slipping out of the hook when the releasing gear was locked, and that in this instance the point of the hook had become somewhat blunted and the two “finger guards” somewhat distorted so that the space between the eye of the hook and the “finger guards” was unduly wide and permitted the link to slip out from the hook even when the releasing gear was locked.

Plaintiff contends and defendant denies that defendant breached and negligently performed said contract, in not inspecting the hook at the after end of the lifeboat, and the finger guards and the link at the end of the fall that goes into said hook, and in not reporting to plaintiff that the hook was blunted and the space between the finger guards and the end of the hook was unduly wide and

would permit the link to slip out from the hook, and in not, as a part of its contract, repairing said condition; and in hooking the link of the fall into the hook in such a careless manner that the link could slip out or off the hook and permit the boat to fall, and that the foregoing acts constituted a breach of said contract, rendering defendant liable for the consequences thereof.

Plaintiff contends that as a result of defendant's acts as aforesaid, the link of the davit fall did become detached from the hook, either because of the aforesaid conditions, or because defendant's employees who last used the hook did not place the link properly therein, and because of that, when the lifeboat drill was conducted shortly thereafter, the boat fell into the water as aforesaid and injured Nelson and Yee and damaged the lifeboat davits and equipment.

That under the admiralty and maritime law and the Jones Act, plaintiff was liable to Nelson and Yee, not only in damages, but for their maintenance and cure, and that it paid Nelson \$35,000 in damages, and \$1688 maintenance and cure, which sums were reasonable and owing, and that it paid Yee \$6750 damages and \$824 maintenance and cure, which sums were reasonable, and that it incurred an expense of \$3683.01 in the repair of the lifeboat, its davits, falls, and appurtenances, all of which were occasioned by defendant's said breach and negligent performance of said contract, and which sum was reasonable. Defendant also incurred and paid the sum of \$1500 in the Nelson case as

attorney's fees, and the sum of \$600 in the Yee case as attorney's fees, which sums are reasonable. The total sums, therefore, claimed by plaintiff and defendant amount to \$50,045.01, with interest from December 5, 1955, on \$41,871.01, and from July 3, 1956, on \$8,174.

Contentions of the Defendant

I.

The defendant denies contentions of the plaintiff.

II.

The defendant further contends that the defendant's only contractual obligation concerning the lifeboat involved was to load it and unload it with sand in order that it could be weight tested by the United States Coast Guard.

III.

That the defendant had no duty to inspect the hook, ring, guards or releasing device or to report or repair any possible defect in the same.

IV.

That the plaintiff knew or should have known of any defect which might be found to have existed in said hook, ring, guard or releasing device.

V.

That the plaintiff was negligent in failing to inspect the aforesaid hook, ring, guard and releasing device prior to ordering the said Nelson and Yee into the lifeboat.

VI.

That even if the defendant were found to be negligent, the plaintiff was at least a joint tortfeasor and, therefore, cannot recover indemnity against the defendant.

Exhibits

The authenticity of the following exhibits is admitted:

Plaintiff's Exhibits

1. United States Coast Guard Rules and Regulations for Cargo and Merchant Vessels.
2. Deposition of LaVern R. Hinrichs.
3. Contracts between the parties concerning the Java Mail.
4. Deposition of David E. R. Patterson.
5. Statement of Peter P. Flovik.
6. Statement of John J. Stene for U. S. Coast Guard (for impeachment only).
7. Release executed by Benjamin Nelson.
8. Release executed by Chan Ting Yee.
9. Invoices for repairs to lifeboat and davits.
- 9a. Bill of Albina for lifeboat test.

Defendant's Exhibits

10. Plaintiff's answers to interrogatories.
11. Deposition of Clyde R. Toole.

Conclusion

This pretrial order is supplementary to the pleadings in the case and the pleadings shall be considered amended by any issues or contentions raised

in this pretrial order which are not made issues or contentions by the pleadings.

Dated this 27th day of May, 1957.

/s/ ERSKINE WOOD

Of Attorneys for Plaintiff.

/s/ ARNO H. DENECKE

Of Attorneys for Defendant.

Approved:

/s/ CLAUDE McCOLLOCH.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause No. 8459.]

STIPULATION

In clarification of plaintiff's answer to defendant's interrogatory No. 10,

It Is Stipulated that the answer refers not to the date of the interrogatory or answer but to the time the ship was lying at Longview shortly after the accident undergoing repairs.

Dated this 8th day of August, 1957.

/s/ ERSKINE WOOD

Of Attorneys for Plaintiff.

/s/ ARNO H. DENECKE

Of Attorneys for Defendant.

[Endorsed]: Filed August 8, 1957.

[Title of District Court and Causes Nos. 8459-8787.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These two cases were by order of the Court and consent of the parties consolidated for trial and are now consolidated for the purpose of these Findings of Fact and Conclusions of Law, and the Judgment to be entered thereon.

Findings of Fact

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware.

2. Defendant is a corporation organized and existing under the laws of the State of Oregon.

3. These are civil actions and the amount in controversy in each is in excess of \$3,000, exclusive of interest and costs.

4. At the time of the events herein stated plaintiff was, and now is, the owner of the steamship Java Mail, a combined cargo and passenger ship.

5. On or about April 1, 1955, plaintiff and defendant entered into a contract by which defendant was to make weight tests on the port and starboard lifeboats of said Java Mail and their equipment, including the cables, davits, etc. Part of said equipment is a hook and two guards, or "keepers", at each end of the lifeboat, and a swivel link attached to the end of each davit fall, which link is connected with said hook when the boat is to be

lifted or lowered, and when once so connected the swivel link is not supposed to come out of the hook until released by the releasing gear provided for that purpose. It was an obligation of defendant under said contract, in making tests of the equipment, to report to plaintiff any defects discovered in said equipment, so that plaintiff could give the necessary orders to have them repaired.

6. Defendant breached its said contract in this, to-wit: In making the test on the starboard lifeboat and its equipment, defendant discovered that the said equipment was defective, faulty and dangerous, in that the swivel link could slip out and become disconnected from the said hook even when the releasing gear was locked, thus permitting that end of the boat to fall, but did not report said dangerous defect to plaintiff, nor take any steps whatever to correct it.

7. Plaintiff did not know of, and had no reason to suspect the existence of, said defect.

8. Shortly after defendant left the said lifeboat, supposedly having completed the test, the crew of the ship attempted to have a lifeboat drill with this boat. In the course of said drill, while the boat was swung outboard from the ship, and was hanging from the davit falls, the said swivel link became disconnected from the said hook because of the aforesaid defects, and the after end of the boat fell, pulling the forward end along with it, and wrecking the davits, and plunged into the water, with the

result that two of the men in the lifeboat, one named Nelson and another named Chan Ting Ye, were seriously injured, Nelson losing a leg, and the lifeboat, the davits and appurtenances were seriously damaged.

9. Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect.

10. The said two men commenced actions at law in the state court, which were removed to the United States District Court for Oregon, to recover damages for their said injuries because of the unseaworthiness of the said lifeboat, and plaintiff settled the Nelson case for \$35,000, and the Chan Ting Ye case for \$6,750. Besides paying these two sums to these two men, plaintiff paid Nelson \$1,688 for maintenance and cure, and Chan Ting Ye \$824 for maintenance and cure, all of which sums were reasonable and incurred by reason of defendant's breach of its said contract. Defendant also paid the sum of \$1500 in the Nelson case as attorney's fees, and the sum of \$600 in the Ye case as attorney's fees, which sums were likewise incurred because of defendant's said breach, and are reasonable. Plaintiff also incurred an expense of \$3683.01 in the repair of the lifeboat, its davits, falls and appurtenances, all of which were occasioned by defendant's said breach of its said contract, and which sum was reasonable. The defendant has stipulated that the total amount of these damages is \$50,045.01, with

interest from December 5, 1955, on \$41,871.01, and from July 3, 1956, on \$8,174. (Pretrial Order and Transcript, 73-74.)

Conclusions of Law

The Court concludes that defendant breached its said contract with plaintiff, and that as a result of said breach plaintiff was damaged in the sum of \$50,045.01, with interest at 6% per annum from December 5, 1955, on \$41,871.01, and from July 3, 1956, on \$8,174.

Judgment for plaintiff and against defendant should be entered accordingly, with costs to plaintiff.

Dated August 14th, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 14, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8459

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Defendant.

Civil No. 8787

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Defendant.

JUDGMENT

These cases having been consolidated for trial and judgment, and having come on for trial before the Court, the Honorable Claude McColloch, sitting without a jury, and the plaintiff appearing by its attorney, Erskine Wood, and the defendant appearing by its attorney, Arno H. Denecke, and the Court having heard the evidence of the parties, the oral arguments of counsel, and considered their briefs, and having made and filed its Findings of Fact and Conclusions of Law, it is now, based thereon,

Considered, Ordered and Adjudged that plaintiff recover of and from defendant the total sum of

\$50,045.01, with interest at 6% from December 5, 1955, on \$41,871.01 of said total amount, and from July 3, 1956, on \$8,174 of said total amount, together with its costs and disbursements taxed at \$178.15.

Dated August 14th, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 14, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure, the defendant moves the Court to amend its findings as follows:

I.

Amend that part of findings of fact set forth in finding of fact No. 7 stating as follows:

“Plaintiff did not know of, and had no reason to suspect the existence of, said defect.”

And substituting therefor the following finding of fact:

“Plaintiff either knew of or should have known of the existence of said defect.”

For the reason that all the evidence is to the effect that the defect was in existence for such a period

of time that the plaintiff either must have known or should have known of the defect.

II.

Amending paragraph 9 of the findings of fact which states as follows:

“Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect.”

And substituting therefor:

“The plaintiff did not inspect the swivel hook and keepers before permitting Nelson and Ye to enter the boat, and plaintiff had a duty to make such inspection, and plaintiff’s failure to make such inspection constituted negligence.”

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,

/s/ By ARNO H. DENECKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 19, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

NOTICE OF APPEAL

Notice is hereby given that the defendant Albina Engine & Machine Works, Inc., a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment

and the whole thereof entered in each of the above entitled and numbered cases on the 14th day of August, 1957.

Dated this 12th day of September, 1957.

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,

/s/ By ARNO H. DENECKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 12, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

UNDERTAKING ON APPEAL

Know All Men by These Presents, That we, Albina Engine & Machine Works, Inc., as principals, and Glens Falls Insurance Company, as surety, are held and firmly bound unto American Mail Line, Ltd., a corporation, plaintiff, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid the said American Mail Line, Ltd., or its assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents. Sealed with our seals and dated this 12th day of September, 1957.

Whereas, on the 14th day of August, 1957, in the United States District Court for the District of Oregon in an action pending in said Court between said plaintiff and the said defendant, among others,

rendered a judgment for the plaintiff and against the defendant and for the plaintiff's costs herein incurred, the said defendant having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid action by appeal to the United States Court of Appeals for the Ninth Circuit.

Now, the Condition of the above obligation is such that if said defendant shall pay the costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if judgment is modified, then the above obligation to be void; or else to remain in full force and virtue.

ALBINA ENGINE & MACHINE
WORKS, INC.,

/s/ By ARNO H. DENECKE,

One of Their Attorneys,
Principals.

[Seal] GLENS FALLS INSURANCE
COMPANY,

/s/ By ADDISON P. KNAPP,
Attorney,
Surety.

Countersigned:

JEWETT, BARTON, LEAVY &
KERN,

/s/ By ADDISON P. KNAPP,
Resident Agent.

[Endorsed]: Filed September 12, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

STIPULATION ON EXHIBITS

It is hereby stipulated by and between the parties hereto through their respective attorneys that the original copies of all exhibits introduced in the within cause be sent to the clerk of the United States Court of Appeals for the Ninth Circuit in lieu of copies thereof.

Dated this 23rd day of September, 1957.

/s/ ERSKINE WOOD

Of Attorneys for Plaintiff.

/s/ ARNO H. DENECKE

Of Attorneys for Defendant.

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

ORDER

Based upon the stipulation of counsel and for good cause shown,

It Is Hereby Ordered that the clerk of the above-entitled Court transmit to the clerk of the United States Court of Appeals for the Ninth Circuit the originals of all exhibits introduced in the within cause.

Dated this 8th day of October, 1957.

/s/ GUS J. SOLOMON,

Judge.

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause Nos. 8459-8787.]

ORDER

Plaintiff's exhibits as listed in the pretrial order, 1, 2, 3, 4, 5, 7, 8, and 9, and defendant's as listed in the pretrial order, 10 and 11, were received into evidence in the above-entitled actions.

Dated this 2nd day of December, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

/s/ ERSKINE WOOD
Of Attorneys for Plaintiff.

/s/ ARNO H. DENECKE
Of Attorneys for Defendant.

[Endorsed]: Filed December 3, 1957.

[Title of District Court and Cause No. 8459.]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Interrogatories to plaintiff American Mail Line, Ltd., a Corp., Amended Complaint, Pretrial Order, Stipulation as to date referred to in Interrogatory or answer, Findings of Fact and Conclusions of Law, Judgment, Objections to Findings of Fact and Conclusions of Law, Notice of Appeal, Undertaking on Appeal, Stipula-

tion as to record, Stipulation extending time for filing record on appeal, Order extending time for filing record on appeal and docketing appeal, Stipulation on Exhibits, Order to transmit original exhibits to Court of Appeals, Order that plaintiff's Exhibits 1 to 9 be received in evidence, Transcript of docket entries, together with the documents being forwarded in Civil 8787, which is consolidated with this cause, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8459, in which American Mail Line, Ltd., a corporation, plaintiff, and Appellee, and Albina Engine & Machine Works, Inc., a corporation, is the Defendant and Appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript of testimony, May 27, 1957, filed in this office in this cause, together with exhibits 1 to 11, inclusive.

I further certify that the cost of filing the notice of appeal \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 3rd day of December, 1957.

[Seal] R. DeMOTT,
Clerk.

/s/ By MILDRED SPARGO,
Deputy.

[Title of District Court and Cause No. 8787.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Summons, Court Blotter entry, dated September 10, 1956, Answer, Court Blotter entry, dated October 8, 1956, Court Blotter entry, dated December 3, 1956, Amended Complaint, Transcript of docket entries, together with the documents being forwarded in Civil 8459, which is consolidated with this cause, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8459, in which American Mail Line, Ltd., a corporation, plaintiff and Appellee, and Albina Engine & Machine Works, Inc., a corporation, is the Defendant and Appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the Appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 3rd day of December, 1957.

[Seal]

R. DeMOTT,

Clerk,

/s/ By MILDRED SPARGO,
Deputy.

United States District Court
District of Oregon

No. Civil 8459

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Defendant.

No. Civil 8787

AMERICAN MAIL LINE, LTD., a corporation,
Plaintiff,

vs.

ALBINA ENGINE & MACHINE WORKS, INC.,
a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, May 27, 1957

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Erskine Wood, of Attorneys
for Plaintiff. Mr. Arno H. Denecke, of Attorneys
for Defendant. [1]*

(Counsel for the respective parties made
opening statements to the Court, and thereafter
the following occurred:)

* Page numbers appearing at top of page of Reporter's Trans-
cript of Record.

CLYDE TOOLE

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Mr. Toole, you are Port Engineer, are you not, or are you Superintendent of American Mail?

A. I am Superintending Engineer, American Mail.

Q. Speak a little louder.

A. Superintending Engineer of the American Mail at the present time, yes. I was Port Engineer.

Q. What was your position at the time of this accident? A. Port Engineer.

Q. Are you the man who made the agreement with Albina for this lifeboat test?

A. Yes, sir. I am the man who passed the order to Albina to perform the test.

Q. Whom did you talk to?

A. Mr. Bailey.

Q. Now, Plaintiff's Exhibit 3, under date of April 1st, [2] 1955, is some specifications for repairs to the ship, for her to go through her annual inspection; is that right?

A. Yes, sir; this is the one.

Q. Then attached to that below it there is another set of specifications dated April 7th, is there not? A. That is right.

Q. So that the Court may more easily look at these later on, it is on the second page of those spec-

(Testimony of Clyde Toole.)

fications dated April 7th that the lifeboat test is referred to, is it not? A. Yes, sir; it is.

Q. That is the top item?

A. Item 30, yes, the top item.

Q. Now, you wrote that up after you had had the talk with Mr. Bailey, did you?

A. Yes. These were written afterwards.

Q. In fact, it was written up after the accident, was it not? A. Yes, sir.

Q. State whether or not that carried out and embodied your oral agreement with Mr. Bailey?

A. I didn't understand, Mr. Wood.

Q. Did that written specification put into writing what you had agreed on with Mr. Bailey?

A. Yes, sir. This is right.

Q. How much was paid for that particular item? [3] A. Beg pardon?

Q. How much did Albina charge you for that lifeboat test? I think they sent you a bill later on.

A. They sent me a bill. I believe it is \$240 or \$260.

Mr. Wood: May I have Exhibit 9-A, please. Will you hand that to the witness.

Q. Mr. Toole, on Exhibit 9-A will you please pick out the item where Albina billed you for this work, the item where they billed you for this lifeboat test? A. Yes, sir; I have it.

Q. What page is it on?

A. It is on Page 5, Item 30, of Albina's invoices.

Q. Will you read that billing. Read it so the Court can hear it.

(Testimony of Clyde Toole.)

A. "Weight Testing—Port & Starboard Lifeboats & Equipment: Furnished weight, 165 pounds per person for 66 persons capacity, and accomplished weight test of each the port and starboard lifeboats, cable, davits, etc. Note: Accomplished to satisfaction of U. S. Coast Guard." The price is \$240.00.

Q. Does that language compare with the previous specification on Exhibit 1?

A. It is the same, Mr. Wood, other than being in the past tense. This is stating that they had accomplished the work.

Q. That is what I thought.

A. Yes, sir. [4]

Q. Both in the specifications and the bill they say they shall make the test, including the cables, the davits, and so forth, do they not?

A. Yes, sir.

Q. But on the specifications it says to be accomplished to the satisfaction of the Coast Guard?

A. Yes, sir.

Q. On the bill it says it was accomplished to the satisfaction of the Coast Guard? A. Yes, sir.

Q. If it was accomplished to the satisfaction of the Coast Guard, did that relieve them of satisfaction to you or your company under the contract?

Mr. Denecke: I object to that, your Honor, as calling for a conclusion.

The Court: You may answer.

Mr. Wood: You may answer.

(Testimony of Clyde Toole.)

A. No, we might require something further than the Coast Guard. We must satisfy the Coast Guard, but then if I were not satisfied at the time I could ask more or request them to do more.

Q. You have, I suppose, had many of these contracts with the shipyards, have you not?

A. Yes, sir.

Q. In your interpretation of the contract and in the practice [5] among shiprepair men was Albina's obligation under the contract, if they found anything wrong with either the finger guards or this hook, to report it to you or do something about it?

Mr. Denecke: Same objection.

The Court: He may answer.

A. Yes, sir. I would expect them to tell me anything they found wrong so we could correct it.

Q. If they reported anything wrong to you, you would give the order to them to correct it; is that right?

A. Yes, sir.

Q. Take this particular boat, when the boat was swung up or lifted by the falls or davits and then travels on its rollers on the davits into its cradle on the boat deck, is it handled by manpower, or does anybody touch the falls or the sling or the link or anything, or is it done automatically by machine?

A. It is done automatically all the way up with the exception of the last few inches of the last foot. Then they have a cutoff switch that stops the power to the motor so that the motor will not raise the boat any higher. Then they will go to a hand crank to bring the boat in the last foot, at which time if

(Testimony of Clyde Toole.)

the boat is going to stay there then they put gripe around it to secure it in that position.

Q. Yes. And none of that involves touching or in any way [6] changing the hook or the link?

A. No, sir.

Q. Or the davits? A. No, sir.

Q. Or the falls? A. No, sir.

Mr. Wood: That is all.

Cross Examination

Q. (By Mr. Denecke): Mr. Toole, when did American Mail purchase the Java Mail, approximately? A. In 1948.

Q. At least before 1950. I noticed you had a little question in your mind? A. Yes.

Q. But they had it sometime before 1950?

A. Yes.

Q. Am I correct, Mr. Toole, that in your conversation with Mr. Bailey concerning the lifeboat test you said to him words to this effect: "The Coast Guard wants her weight-tested. Will you take care of it?"

A. Yes, I may have said, "We have to have a weight test on her; the Coast Guard asked me to have one," or words to that effect. [7]

Q. Mr. Toole, under whatever contract you had with Albina, Albina had no duty under that contract to inspect the releasing device, the hook and ring and the guards on the lifeboat, did they?

A. We always expect the workmen performing

(Testimony of Clyde Toole.)

the work to inform me of anything they might find wrong.

Q. That is not quite what I asked you, Mr. Toole. I am going over matters we talked about in your deposition, and I think I am correct, am I not, that it is your belief that Albina had no duty to inspect the hook or ring or guards or other things about the lifeboat to determine whether or not something was wrong?

A. Albina in her handling of everything will notice defects. A man handling any piece of equipment will notice defects. If a defect is noted, it is Albina's duty and obligation to inform me of that.

Q. All right. I want to know, though, Mr. Toole—instead of using the word “inspect,” I will ask you this: Is it your belief that under the contract you had with Albina that Albina was obligated to examine things and look them over to see whether there were any possible defects?

A. That is a rather hard question to answer. The contract never states that they are to inspect anything. If I could clarify that a little, a contract on the overhaul of a pump, I might tell them to open it up so that we may find out what [8] is wrong with the pump, knowing there is a fault. They would open it up, and after opening it up they would inform me that it was opened and ready for my inspection, for me to look at. And if I were busy elsewhere, they might tell me what was wrong with it, what they had found. I would then instruct them to make the necessary repair, whatever that repair

(Testimony of Clyde Toole.)

might be. It is Albina's obligation to the owner of a vessel to inform him of any defect he notes on the equipment that I was handling or working with—not only Albina, but any repair yard.

Q. Let me ask you if I didn't ask you this question and you didn't give me this answer—this is in the deposition taken in Mr. Wood's office—

“Q. As the Port Engineer do you consider it the duty of the repair yard in conducting a weight test—not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the ring to become disengaged when it is resting in the water?

“A. No, that is not necessarily part of their work. Their responsibility is to report anything they do see wrong to me.”

Did you give that answer? A. Yes. [9]

Q. So do I understand that you were trying to distinguish there that they have no duty to inspect or examine—or they didn't under this particular part of the contract have any duty to inspect and examine, but you are stating that if they see something wrong then they ought to report it?

A. Yes, that is right. There is a differentiation between the word “duty” and “responsibility” in this case in my mind.

Q. Now, you were talking there before about opening up a pump. Am I correct, Mr. Toole, that what you are saying, what your meaning is, is that there

(Testimony of Clyde Toole.)

are some things that are not open or have not been opened for inspection or examination by the ship's personnel; they are covered up with plates, and so forth? A. Yes.

Q. You are saying that Albina in such an instance, where they do open up a pump and look at an area that was not open to the ship's personnel, they then have a duty to tell you what is wrong with it if there is anything wrong with it?

A. Yes, sir; that is correct. I took a pump as an example. It is any piece of equipment that the repair yard might be handling or repairing. If they find repairs that are necessary further than I have informed or instructed them to do previously, they should tell me that that is necessary. They should tell me of the faults that they find. [10]

Q. Now, Mr. Toole, you had occasion after the accident to examine this particular hook and ring and guard, did you not? A. Yes, sir.

Q. I think both in Portland and in Longview, did you not, or was it just in Portland?

A. No, I was in Longview, also.

Q. Did you find on such examination that it was possible for the ring to slip over the hook? Did you find on such an examination, Mr. Toole, that if this line was slack it was possible for the ring here to slip over the hook and past the guard?

A. Yes, sir.

Q. Was that condition that you saw there, Mr. Toole, one that was quite open and apparent when you looked for it?

(Testimony of Clyde Toole.)

A. When you looked for it, yes, it was very apparent that it would fall out.

Q. Am I correct, Mr. Toole, that from your examination, at least, there was no damage to the ring, hook or guard?

A. The guards were bent out of shape. The guards were spread.

Q. Was there any indication that the spreading had occurred recently?

A. I couldn't say.

Q. There was paint on the guards, was there not? [11]

A. I don't recall that.

Q. Am I correct, Mr. Toole, that anybody that looked at this hook, ring and guard would see that the guard was in such a position or the ring was of such size that you could slip it out despite the guard being there?

A. It was apparent that that would occur, yes.

Q. Captain Endresen of the U. S. Coast Guard was present and actually stated that the boat passed the weight test; isn't that correct?

A. He was present. He didn't state to me that the boat had passed the weight test. I understood that it had.

Q. Were you on the vessel when they weight tested it?

A. I don't know if I was or not. I don't believe so. I believe they weight-tested it that morning. I had been aboard ship perhaps ten minutes prior to the time the boat fell. I was in an alleyway. The

(Testimony of Clyde Toole.)

boat was not in my view at the time, but I heard the rumble of it and the crash.

Mr. Denecke: That is all. Thank you.

(Witness excused.)

Mr. Wood: I would like to inquire as to your Honor's wishes about these depositions. I rather assume you don't want them read but would prefer to read them yourself; is that correct?

The Court: Yes. You can argue from them. [12]

Mr. Wood: There is just a brief statement that Mr. Hinrichs made in his deposition which is informative. It shows how the ring was just balanced on the point of the hook. But it can be referred to in the argument. He was in the boat when it went down.

I will call Mr. Stene.

JOHN J. STENE

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Mr. Stene, at the time of this accident you were an employe of the Albina Company, weren't you? A. That is right, sir.

Q. As a rigger? A. Right.

Q. Are you still employed by the company?

A. No, I am not. I am foreman for Monarch Forge & Machine Company at the present time, of the riggers. [13]

(Testimony of John J. Stene.)

Q. I will say as a preface you testified before the United States Coast Guard about this, didn't you? A. That is right; yes, sir.

Q. So I will explain to you that I know pretty much what you are going to say, but I want to ask these questions because the Court has to be informed of what you are going to say.

A. Yes.

Q. You were employed at that time as a rigger by Albina. You have had some experience as a seaman and in the Coast Guard, too, have you not?

A. That is right, sir.

Q. You were one of the two men in the lifeboat when the tests were conducted, weren't you?

A. Yes.

Q. And the other man was a welder of Albina?

A. Yes.

Q. He was a less experienced man than you, I take it, and was taking his directions from you?

A. That is right.

Q. Were you in the courtroom when I made an opening statement and explained how the boat was drifted back from the No. 2 falls to get sand and back and forth again? A. Yes, sir.

Q. And finally brought back under the No. 2 davits at No. 2 [14] hatch? A. Yes.

Q. My statement was substantially correct in that particular?

A. Pardon me for interrupting. That would be the No. 1 davit, the starboard side of No. 1.

(Testimony of John J. Stene.)

Q. Yes, but it was at No. 2 hatch? I mean by No. 2 hatch? A. Yes.

Q. Now we will come to the crucial part. After you had got rid of the sand and brought the boat back to what we will now call the No. 1 davits——

A. Yes, sir.

Q. ——the swivel or link—the two names have been given to this thing, and sometimes we call it a swivel and sometimes a link. But, anyway, you had hooked the link into the hook on the lifeboat, had you not? A. Correct.

Q. At the after end? A. Yes, sir.

Q. That is the end that gave way?

A. Yes.

Q. And the forward end was likewise rigged with the link and the hook connected by the welder; correct? A. Yes, sir.

Q. Then, having completed the actual weight test, you were [15] ready to leave the boat, weren't you?

A. No, we secured the security—what we call the trip—that consists of a bar that you swing from the port side of the boat facing forward over to the left, and you have a security pin in it and that turns the lower part of that hook over to secure so the top part of that particular swivel will lock with the top end of the hook to prevent that link from coming outside.

Q. What you call the trip is the same as what we call the releasing gear?

A. That is right. It is the same thing.

(Testimony of John J. Stene.)

Q. It is the same thing. That is in the middle of the boat on the floor? A. Yes, sir.

Q. Now, what did you do toward placing the link properly in the bight of the hook?

A. We have to slip it in and then throw your trip to lock it. That is all there is to it. There is just three links in the end of the lower part of your davit block. All you have to do is slip it in the link and then throw your releasing gear to put safety on it.

Q. When you slipped it in and the releasing gear was thrown the hook was in an upright position, wasn't it?

A. The hook stays in the same position at all times. It is the lower part of the swivel that works on a collar. The [16] hook is absolutely permanent. It is in an upright position, but it has more of an end to it than you have there (indicating drawing on blackboard). In fact, the hook is like this (indicating).

Q. Yes.

A. And the end of that hook is supposed to meet the top part of that swivel. It works on a pivot from the releasing gear. It has one arm across the thwart of the boat and also one arm that goes back, and that moves that thing back and forth.

Q. When the releasing gear is locked, the link is supposed to be fast in the hook so it can't get out?

A. It should be right in the bight of that hook, yes, with the lines taken up tight.

(Testimony of John J. Stene.)

Q. That is the way it was when you fastened it there, was it?

A. That is right. Well, when we left the boat, the boat was bobbing in the water, and there is a lot of disturbance in the river as traffic goes up and down the river, and the boat was just laying there rocking. But the link was in the hook on both the forward and aft of the boat when we left it and came topside.

Q. You are sure, are you, that it was properly in the bight of the hook instead of being balanced on the tip of the hook, perhaps? [17]

A. We riggers always check things twice. That is a second procedure in rigging. First you make your hook-up and then you recheck it to be absolutely sure.

Q. Did you check it?

A. Yes, sir; I did. I checked both fore and aft on the boat.

Q. According to you, the link was in place and in the bight of the hook and the releasing gear was locked? A. Absolutely, sir.

Q. But the hook had a blunt end, didn't it?

A. It did; yes, sir. I recall that.

Q. You testified about that in the Coast Guard hearing. In fact, its end was so blunt that you stated it would be possible for the link to ride on the point of the hook for some time without coming off?

A. It could be possible, if they had a slack line. If they slacked upon the line from up above and

(Testimony of John J. Stene.)

the boat could be bobbing around, that link could work out from the center of the hook.

Q. Now I am simply reviewing your testimony before the Coast Guard. The point of the hook was worn and blunted, wasn't it? A. Yes, sir.

Q. So much so, so flat, you might say, that it was possible for the link to balance on the flat end of the hook and to [18] ride the hook for some time without coming off; isn't that right?

A. It could be possible, sir.

Q. Yes. In fact, it could ride the point of the hook all the time that the boat was lifted up to the davits and partway back again, couldn't it? That would be possible? A. Yes, sir.

Q. Now, these finger guards that we have talked about here, or keepers, they are supposed to keep the link from slipping out, are they not?

A. Yes, sir.

Q. There is two of them, one on each side?

A. Yes, that is right.

Q. And in this instance they were bent or short so that there was quite a space between them and the hook; is that right? A. Yes, sir.

Q. So it was possible to slip the link in there and out again even while the releasing gear was locked? A. That is right, sir.

Q. Instead of releasing the releasing gear, as you have described, to put the link in place, wouldn't you just slip it in there like that (illustrating)?

A. Well, I could have, sir, but I don't know-

(Testimony of John J. Stene.)

it is automatic with me, when I handle lifeboats, I am so used to [19] it, that I throw the trip regardless.

Q. You throw the trip?

A. That is right, sir.

Q. You realized that this was really a defect in the equipment, didn't you?

A. Well, I have seen on shipboard a lot of lifeboats with the same hook-up. The only thing you have to watch there is that first you take it up so you get your lines taut and then you proceed—your link should be right up in the bight of that hook, and the line will be tight.

Q. That is right.

A. From there on you give the second signal and that means that she is absolutely secure. When you have a pull on her, she will never be able to drop down.

Q. While the weight is on the hook, you mean?

A. That is correct. When I left them, she was laying in the river, and that would work and work itself out. I was surprised that you ever got the boat out of the water.

Q. We got diverted from my question. You are an old seaman and you are an old Coast Guard man. You knew that when these keepers were not effective to keep the ring from slipping out that was defective, didn't you?

A. Well, sir, I did. But all I was supposed to do in that instance was to put the test to the boat, and the test was okehed by the Coast Guard inspector,

(Testimony of John J. Stene.)

and then we were told by [20] the superintendent to come topside and go home to Swan Island where we work.

Q. You were told by the Albina superintendent

A. The only thing that I do, I go according to orders.

Q. Yes. When you did notice this condition—

A. I noticed that.

Q. — and when I say “this condition” mean this space between—

A. I noticed that when I first stepped in the boat at the boat deck and rode the boat down. In fact, I was going to ride her up in the final deck there, too.

Q. You were going to ride the boat up?

A. I was going to ride the boat up when we were completely finished on the boat deck, but they took us up about 10 or 15 feet, and then they decided to leave the boat in the water. They were going to have a boat drill and fire drill. They lowered us down in the water again, and that is the condition of the boat when I left it.

Q. You did know that it shouldn't be in that condition, didn't you?

A. Yes, I knew it was very unsafe to have those things—the hook should meet the swivel, the lower part of the swivel, to lock that link in.

Q. And the finger guards should be locked?

A. That is right. [21]

Q. But you didn't feel it was your place to report that to your superintendent or anybody?

(Testimony of John J. Stene.)

A. Well, the link was up in the hook when I left it. And if they had taken the boat topside from that the accident wouldn't have happened. But they left that boat bobbing in the water, and anything could have worked loose. It is absolutely not a safe hook-up.

Q. At any rate, whether you felt it was your duty or not, you didn't report this condition to the ship or the Coast Guard or Albina, did you?

A. I didn't have anything to do with that. I was just going according to orders.

Q. When you left the boat you say it was in the water bobbing around. There was a little chop there, I suppose, in the water? A. Yes.

Q. You left right after that. I don't know whether you can answer this question or not: Do you know how long the boat remained there in the water?

A. I certainly don't. I don't know a thing about it. I went back to Swan Island with the rigger there.

Q. You left the boat, climbed up the Jacob's ladder and away you went?

A. That is right. We were ordered to go back to Swan Island, and that is where we proceeded to. That is all I [22] know about it. I don't know how the accident happened or anything about it. Nobody has ever told me a thing about it.

Q. I think I interpret your testimony right, but I am not quite sure and I would like to make sure. Your theory about this accident, then, is that be-

(Testimony of John J. Stene.)

cause the hook was blunt and because the keepers were, I will say, defective, the boat when left lying in the water was bobbing around and the falls would be slack so that it would permit this link to joggle around there and become based on the point of the hook like that? A. Maybe.

Q. So that when it was raised up and partly lowered it slipped off. That is your idea, isn't it?

A. That is right. Well, as I recall, the end of that hook, she had sort of a forward little bend to it. I think the picture will show you that. It has got sort of a forward—I don't know; it looked like it was bent. Of course, I didn't look at it that closely. Of course, we were in a hurry there to get through with the test.

Mr. Wood: That is all.

Mr. Denecke: Would the Court mind if I asked Mr. Stene a few questions that were not asked on direct examination? That is all I would have.

Mr. Wood: I have no objection. You mean make him your [23] witness?

Mr. Denecke: Yes.

Q. (By Mr. Denecke): Mr. Stene, you have served a number of years in the Merchant Marine and in the United States Coast Guard, have you not? A. That I have, sir.

Q. During your duties with the U. S. Coast Guard on the Great Lakes, Lake Michigan, you were in charge of lifeboats, were you not?

A. That is right. That is correct.

Q. While working for Albina you have put the

(Testimony of John J. Stene.)

weight in and taken the weight out for quite a few boat tests, weight tests?

A. That is right, sir.

Q. Now, when you brought the lifeboat back to the starboard side after you had taken the sand out and accomplished the weight test, would you state then, Mr. Stene, what happened?

A. Now this is——

Q. Have you got the time right? You have taken the sand out and the weight test has been accomplished and the Coast Guard inspector indicates he is satisfied. Then would you state in as much detail as possible what happened there.

A. Well, the ship's crew—they were working forward— [24] we had guy line painters on the boat that they were pulling us back and forth with. They pulled us back underneath the gear. And this gentlemen, Becvar, over here and myself—Mr. Becvar and I put the trip back and secured it, and I gave the signal topside.

Q. May I interrupt a minute. You tripped or fixed the releasing gear trip there?

A. That is right.

Q. Then what did you do, if you did anything, about the hooks and rings?

A. Well, I just put, you know, the link in the hook—he was forward, and then I put the safety on and put the pin in to have it secure, and I told whoever was at the controls up there on the boat deck to take up. Then they took the line tight, and then I checked the both hook-ups again to see that

(Testimony of John J. Stene.)

the link was in the hook, and it was right in the center of the hook. And I told them to take us up and they took us up about 10 or 15 feet. In fact, we were going to ride the boat up to the boat deck and get out there, because we already had orders that the test was over and we were through. But instead of that—I don't know whether it was Mr. Bailey or the Coast Guard Inspector—hollered down to me and said, "John," he said, "the test is over." He says, "You might just as well go back to Swan Island." I don't know whether that was Mr. Bailey or someone up there [25] on the deck—I didn't notice—but they was going to have a fire drill and boat drill, so they were going to leave the boat in the water, and they lowered it down to the water. And that is the position of the boat when the welder and I left it. I came out of the boat first. I climbed the Jacob's ladder and he came after me. That is the last I saw of the boat.

Q. When you left the boat, you and Mr. Beevar there, do you know whether or not the links were in place?

A. The last look I had they were just dangling you know.

Q. But the link was inside of the hook on both fore and aft? A. Yes.

Mr. Denecke: That is all, your Honor.

(Witness excused.)

Mr. Wood: I would like to recall Mr. Toole for just one question. I don't know how important it is

CLYDE TOOLE

was recalled as a witness in behalf of the Plaintiff and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Mr. Toole, you said that after the ship moved down to Longview the link and the guards, and so on, were still in the same condition, the guards down, you said.

A. They were spread.

Q. Later did you correct that so that this could not happen again?

A. We had Albina straighten those up, straighten the fingers or guards up, to prevent that from happening again. But during the test in Longview on the offshore side the links did come out of the hook again there.

Q. Yes, I know that, and Mr. Denecke knows that. But later on you did do some further work on it so that it was absolutely impossible for those to slip out, didn't you? A. Yes, sir; in Seattle.

Mr. Wood: That is all I wanted to know.

The Court: He didn't finish his answer. What did you say about Seattle?

A. In Seattle we had larger swivels put in these. We had Albina put new swivels in here after the accident. You see, the swivels they put in were smaller diameter than the original [27] swivels so they would slip past the fingers. In Seattle we had those swivels removed and larger swivels installed so that they wouldn't slip past the fingers in the future.

(Testimony of Clyde Toole.)

Mr. Wood: That is all.

Cross Examination

Q. (By Mr. Denecke): I want to ask you a couple of questions here. A. Yes.

Q. Mr. Toole, at Longview you had Albina press together the guards?

A. Yes, that is right.

Q. Did you have Albina change the ring or the swivel at that time?

A. No. The swivels were changed in Portland prior to that time, at the time of the repair of the lifeboat, at the time of renewal of the cables.

Q. Let's get this in sequence. After the accident and still in Portland you had Albina put on new rings and swivels? A. Yes.

Q. Were those larger or smaller than——

A. They were smaller than the original.

Q. All right. Then at Longview you had the guards pressed together more? [28]

A. Yes, that is right.

Q. Then in Seattle you replaced the rings that had been put on here in Portland with larger rings or swivels?

A. Yes, back to the original size.

Q. Because, as I understand it, at Longview you found even with the guards pushed together that because of the size of the ring it would still under some circumstances possibly slip around?

A. Yes, that is correct.

Mr. Denecke: Thank you.

Mr. Wood: That is all.

(Witness excused.)

(Thereupon a recess was taken until 1:30 P.M. of the same day, May 27, 1957, at which time Court reconvened and proceedings herein were resumed as follows): [29]

LESLIE L. BECVAR

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Denecke): Mr. Becvar, in April of 1955, when this lifeboat fell, you were working for Albina at the time, were you not?

A. Albina, yes.

Q. And your job was what? Were you a boiler-maker?

A. Yes, I was a boilermaker. I was welder on that job.

Q. Did you get into the lifeboat with the gentleman, Stene, who testified here this morning?

A. Yes, sir.

Q. And you were with it the whole time you went around and got the sand and were in the boat when the boat was raised with the sand in and then when you unloaded the sand? A. Yes.

Q. And brought the boat back; is that correct?

A. Yes, sir.

Q. Mr. Becvar, after the sand was unloaded, after you brought the boat back, would you tell the Court what happened before you and John

(Testimony of Leslie L. Beevar.)

Stene got out. This is after the boat was back and empty.

A. After we had unloaded the sand?

Q. Right. [30]

A. We came back and I was working on the forward part and John was working the aft part.

Q. Could you speak up a little louder?

A. I was working the forward part of the lifeboat and John was working the aft part. And he said to me—I just put it back in the gooseneck. I put it back in the gooseneck there and he put his back in the gooseneck, and then he come amidships and threw the lever back in place there and used some kind of a catch or toggle pin, or something, and he threw that back in place, and then when he finished that he come down to the end I was working and he checked that. And he says, “That is okeh.” And he went back to where he was working, and he said, “Well, that is in place there.” So then he signaled and they started to raise it. Then I believe it was the Coast Guard inspector, he says, “No, leave it down there.” He says, “You fellows take the Jacob’s ladder up.” And that is what we did.

Q. Then did they have to lower the boat again?

A. Pardon?

Q. Did they have to lower the boat again for you to get out? A. I believe so; yes, sir.

Q. When you talk about the gooseneck, Mr. Beevar, you heard the testimony this morning, did you not? A. Yes, sir. [31]

(Testimony of Leslie L. Becvar.)

Q. Were you able to tell—when you call it a gooseneck, is that the same thing that you heard the people this morning calling a hook?

A. Yes. That is the thing where they shove the link into that, and there is a thing that locks it around there.

Q. When you got out of the lifeboat do you know the position of the ring and hook?

A. Well, my end was in.

The Court: Whom are you working for now?

A. Chicago Bridge and Iron Works.

Q. You left Albina?

A. Yes, sir. Yes, I am not working for Albina now.

The Court: You live away from here?

A. I am working out in The Dalles, Oregon, now.

The Court: All right.

Q. (By Mr. Denecke): Mr. Becvar, I think you said that when you left—when you left what was the position of the ring and the hook or the gooseneck, when you left the boat?

A. It was in the hook. It was in the hook.

Q. You are only speaking now of the forward ring?

A. That is on the end I was working on. I never checked the other end because I was more or less just working under John Stene. He was like in charge of the testing, and I was just more or less a helper to him.

(Testimony of Leslie L. Beevar.)

Q. Was the boat resting in the water when you left it? [32] A. Yes, sir.

Mr. Denecke: That is all, your Honor.

Cross Examination

Q. (By Mr. Wood): I thought you said just now that you were not sure whether it was in the water or not when you left it.

A. I wasn't sure whether they had raised it all or not, but I think they did, sir.

Q. You think they did what?

A. They raised it up after we had got back in the boat, and then the Coast Guard inspector, he says, "No, no. You fellows climb up the Jacob's ladder."

Q. Then what was done with the boat?

A. It was left in the water.

Q. Did you step from the boat while it was in the water onto the Jacob's ladder?

A. Yes, sir.

Q. Not while the boat was suspended in the air?

A. No, sir.

Mr. Wood: That is all.

(Witness excused.) [33]

JAMES RICHARD BAILEY

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Denecke): Mr. Bailey, in April

(Testimony of James Richard Bailey.)

of 1955, as well as at present, you were employed by Albina Engine & Machine? A. That is true.

Q. At that time what were your general duties? That is, in April of 1955?

A. Ship superintendent.

Q. And you still occupy that position?

A. Yes.

Q. Now do you recall a conversation with Mr. Toole concerning a weight test for the lifeboats?

A. Not specifically, no.

Q. Had you done work for the weight tests before on American Mail Line ships?

A. Yes, sir.

Q. Do you recall anything that Mr. Toole said to you about the weight test on this particular boat, the Java Mail? A. Out of the ordinary?

Q. Yes. A. No, sir.

Q. What are the ordinary instructions as far as weight [34] testing?

A. Only that the Coast Guard was requiring a weight test on the boats and a request to carry it out.

Q. When you received such instructions from the shipowner what were your instructions to your men?

A. They are dependent quite a bit on circumstances. On this particular job it was arranged to do one boat when the ship had a favorable berthing,—that would be the starboard side to the dock—and we would do the port boat. And at a later date, when the ship was portside to the dock, we

(Testimony of James Richard Bailey.)

would do the starboard boat. And the amount of weight was worked out with the Coast Guard inspector, and I made arrangements to get the weight to the ship and the men to the ship at the time that we had established that we would perform the test.

Q. Is this correct, Mr. Bailey, that in the conduct of this you got weight on board the ship, sand, and that people working for Albina——

The Court: How much, by the way? How much sand?

Q. (By Mr. Denecke): Would you state that, Mr. Bailey?

A. They had 165 pounds of sand for each person that the boat was certified to carry. I believe that is true.

Q. Do you remember the approximate capacity of this particular boat?

A. Only from reading the depositions it was a 66-person [35] boat.

Q. So that to the best of your recollection there was 150 pounds times 66?

A. That is correct, plus 10 per cent, which makes it 165.

Q. Plus a 10-per cent safety factor there; is that right? A. Yes.

Q. Then the Albina people arranged to get the sand, put it in the lifeboat, and then after the Coast Guard inspector was satisfied to remove the sand? A. That is correct.

The Court: May I interrupt you again? Mr.

(Testimony of James Richard Bailey.)

Wood stated in argument that after the sand was out and the boat dropped it weighed two tons. Is that about right?

A. Oh, I would say that it would weigh approximately two tons.

The Court: Is it a steel boat?

A. Yes, sir.

The Court: How far did this boat fall?

A. I would say between 60 and 70 feet, not knowing just where it fell from, but that would be from the extreme——

Q. (By Mr. Wood): How far did you say, Mr. Bailey?

A. Mr. Wood, I said it could have fallen from 60 to 70 feet, but I don't know exactly where it fell from. Its [36] extreme travel, I would say, was 60 to 70 feet.

The Court: Can't you agree where it fell from?

Mr. Denecke: I think we do agree that it fell from the main deck.

Mr. Wood: It was the cabin deck.

Mr. Denecke: The cabin deck.

The Court: On the average how far would that be, Mr. Bailey?

A. I would say close to 40 or 45 feet, depending upon draft of the ship.

Mr. Denecke: I think we can agree on this, your Honor: That the boat was lowered down to the next deck below the boat deck.

Mr. Wood: That is right.

The Court: And fell into the water?

(Testimony of James Richard Bailey.)

Mr. Wood: And fell into the water.

The Court: And it didn't strike anything on the way?

Mr. Wood: No.

Mr. Denecke: That I don't know, your Honor.

The Court: Just these two men were in it?

Mr. Denecke: No, there were four in it, your Honor. Only two were injured.

Q. Were you there the whole morning of the morning of the accident?

A. Almost the whole morning. I wasn't there when it fell. [37]

Q. You were there at the time that the weight was in the lifeboat which was being lifted?

A. Yes, sir.

Q. Let me ask you this: Who was actually working on the lifeboat davit winch for the raising and lowering of the lifeboat?

A. The ship's crew. I can't say which member of the ship's crew.

Mr. Wood: We admit that it was the ship's crew that was on the deck manipulating the machinery that was raising the boat and lowering it.

Q. (By Mr. Denecke): Did you observe after the boat was raised after the weight test the ship's crew working around that lifeboat?

A. Yes, sir.

Q. What in general were they doing?

A. Well, we had taken, of course, the oars, the mast, the sea anchor, ladders, and all the things—they had taken them out prior to putting the

(Testimony of James Richard Bailey.)

weights in to make room for the weights. And these things were being put back. Also, the gripes were fixed up to show the Coast Guard inspector how the gripes didn't fit the boat. That is how I happened to be there.

Q. Do I understand, Mr. Bailey, that after the boat was raised after the lifeboat test the ship's crew put back in [38] all these ship's stores there?

A. Yes, sir; all the equipment.

Q. And also the ship's crew put the gripes back on in order to show that the gripes didn't fit?

A. That is correct.

Q. Now these gripes are lashings around the lifeboat to keep it from swaying back and forth; is that generally correct? A. Yes, sir.

Q. Then, as a result of the ship's crew showing that these gripes didn't fit correctly, were you instructed to have your people do some work on them?

A. Yes, sir. It was a matter of readjusting the arm of the gripe to give it a more favorable lead.

The Court: What did the gripes have to do with this accident?

Mr. Denecke: I don't think they had anything to do with it, your Honor. The purpose in bringing in that testimony was to show that the ship's crew were working around this lifeboat before the accident and after the Albina people had left.

The Court: This was before the accident?

Mr. Denecke: Yes.

Q. This was before the accident?

(Testimony of James Richard Bailey.)

A. Yes, sir. [39]

Q. And the ship's stores were put in it before the accident? A. Yes.

Q. In other words, Mr. Bailey, the ship's crew had gotten everything out of the lifeboat before your people had even taken over so that there was room enough for the sand?

A. Excuse me, but it is customary for the ship's crew to lay the equipment out to be examined by the Coast Guard inspector at the time or sooner—that is true—and then they put it back so that it is a fully stored and equipped boat when they have their fire and boat drill.

Q. Let's see if I understand this. The ship's crew at some time had taken everything out of the lifeboat and put it there on the boat deck, I presume? A. Yes.

Q. For inspection by the Coast Guard inspector? A. Yes, sir.

Q. Then after you people had taken the weight out and left the lifeboat and the lifeboat was taken up and put in the davits, then the ship's crew replaced all these things? A. That is correct.

The Court: He used the expression "annual inspection." Was this an annual inspection?

A. Yes, sir. [40]

Q. (By Mr. Denecke): Then the ship's crew later on got into this lifeboat fire drill when the accident occurred? A. That is right.

Q. Now after the accident, Mr. Bailey, did you have occasion to examine the lifeboat in detail?

(Testimony of James Richard Bailey.)

A. Oh, yes.

Q. Am I correct that was the night after the accident or the night of the accident?

A. The late afternoon of the accident; yes, sir.

Q. Did you examine the hook and the guard and the ring, the aft hook, guard and ring on this lifeboat?

A. Yes, sir.

Q. Were you able to observe, Mr. Bailey, whether or not the position of the guard and its shape had been changed or damaged or anything very recently?

A. In my opinion it had not been, no.

Q. What was there particularly about the guard that indicated to you that that guard had been in the same position that you then observed it for some time?

A. There was no apparent twisting, no bending, as I recall. It looked like the original.

Q. Then did you later on, Mr. Bailey, have further occasion to examine the lifeboat and its actions in Longview?

A. Yes, sir.

Q. Could you tell the Court what you observed about it then? [41] You might tell the Court what was done and what you saw.

A. The boat itself at that time in Longview—we had just repaired the davits so that we could operate the boat again, and the purpose of going to Longview was to make sure that the boat operated properly. And the Coast Guard inspector was present, the same Coast Guard inspector was present, and we then floated the boat and delib-

(Testimony of James Richard Bailey.)

erately let it slack back—of course, Longview has a current in port that Portland doesn't have, but we let the boat slack back in the falls enough so that the hook that wasn't holding against the current unhooked itself while the boat was afloat. I think aside from that there was nothing extraordinary.

Q. Did you notice anything in the position of the gangway davit that would possibly have anything to do with the starboard lifeboat?

A. Yes, sir. My shipfitter and myself called attention of the Coast Guard inspector and the ship's force, too,—this is the starboard boat, isn't it?—to the starboard gangway davit, which was in a frozen position outboard from the molded lines of the ship. And with the ship at an unfavorable position you could possibly have taken the weight of the boat in lowering the boat onto it. We measured the distance between the end of the davit arm in that condition of the ship, and it was between an inch and a half and [42] two inches, I believe, of clearance. We were groping around to try and see what had caused——

Q. Mr. Bailey, I am going to see if I can restate this to see if I have it correctly. At Longview you and someone with you there from Albina—and I take it that some of the ship's personnel were also present there and the Coast Guard inspector?

A. Yes, sir.

Q. You observed that the starboard gangway davit extended out so that when the ship was in

(Testimony of James Richard Bailey.)

certain positions the lifeboat coming down, or going up, as far as that is concerned, could rest on the gangway davit and momentarily, at least, let slack in the fall. Now do I correctly state your testimony?

A. Yes, that is possible. Going up, I doubt.

Q. Well, coming down?

A. Coming down, yes. We pointed it out as a possibility.

Q. You don't know that that happened?

A. I don't know that that happened; no, sir.

Q. Mr. Bailey, is it your understanding of the instructions you received from Mr. Toole that Albina was to do anything further about the lifeboat other than provide the weight, to get the weight in and out of the lifeboat, for the weight test?

Mr. Wood: Excuse me, your Honor. I don't see how he [43] can answer that. He says he doesn't remember the conversation that he had with Mr. Toole.

The Court: He may answer if he can.

A. Mr. Wood is right. I don't remember the conversation that I had with Mr. Toole. I might say, however, that anything we felt was unsafe and it came to our attention would ordinarily be reported to Mr. Toole or to somebody with authority.

Q. (By Mr. Denecke): Whom were you to report to, the ship's crew or to Mr. Toole?

A. Our dealings are exclusively with Mr. Toole, I would say, if he is available. Quite often he has

(Testimony of James Richard Bailey.)

the chief engineer represent him when it is impossible for him to be there.

Q. Let me ask you this: As I understand your testimony, Mr. Bailey, you don't remember this specific conversation with Mr. Toole?

A. No, sir.

Q. You have commonly had instructions from Mr. Toole to weight-test or to provide weight for the tests for the Coast Guard on American Mail ships?

A. Oh, yes.

Q. You don't remember in this conversation him asking you for anything other than he usually did on a weight test?

A. No.

Q. Under those circumstances, in the ordinary request for [44] a weight test, is it your understanding of the contract that you are called upon to make any inspection of the lifeboat or the davits or the falls?

A. No, sir. It is not customary for us to—there is an inspector available at the weight test.

Q. That is the Coast Guard inspector?

A. Yes, sir.

Mr. Denecke: Could the witness be handed Plaintiff's Exhibit 3?

Q. Would you turn, Mr. Bailey, to Supplement No. 1, Page 2, Item No. 30. Now that is the specification for this particular weight test on the Java Mail, is it not?

A. Yes, sir.

Q. I think there is no question about it, but these specifications were not given to you until some days after the accident?

(Testimony of James Richard Bailey.)

A. That was customary, yes.

The Court: What?

A. That was customary, however, for that work to be written up later, at a later date.

The Court: That is not what he is talking about.

Mr. Denecke: I will ask him again, your Honor.

Q. Mr. Bailey, the supplement which you have there—it is the second part of Exhibit 3—that was not handed to you or turned over to Albina until several days after the [45] accident and after the weight test was accomplished; is that not correct?

A. That is correct.

Q. Now in the specifications which you had received previously for other ships, other annuals for American Mail, were the specifications the same, the written specifications?

A. To the best of my knowledge, no.

Q. In what respect did they differ?

A. As I recall—and, as you know, I was trying to find some in our files, and that is why I was late getting back—the item was completed at the end of the first comma, which would then read, “Furnish weight, 165 pounds per person for 66 persons capacity, and accomplish weight test of each the port and starboard lifeboats.”

Q. Am I correct that your recollection of your past specifications is that they ended there?

A. That is my recollection; yes, sir.

Mr. Denecke: That is all, your Honor.

(Testimony of James Richard Bailey.)

Cross Examination

Q. (By Mr. Wood): Mr. Bailey, do I understand you to say, not as a positive fact but that you think the previous specifications differed from this one? Is that what you mean?

A. Yes, sir. [46]

Q. Would you say the same thing about subsequent specifications?

A. I was able to find copies of subsequent specifications.

Q. What?

A. I was able to find copies of subsequent specifications in the recess at noon, and sometimes they were the same and sometimes they did differ as printed out.

Q. You did find some subsequent specifications that were exactly like this, didn't you?

A. Yes, sir.

Q. On the Java Mail, too, weren't they?

A. I didn't look in the Java Mail's folder.

Q. But none of those specifications differed in meaning, did they?

A. No, and I don't think that is a difference in meaning, particularly.

Q. You do state frankly, however—and I want to compliment you for it—that if you did notice anything was wrong in these tests you would call it to the attention of the shipowner as part of your contract, wouldn't you?

A. Oh, certainly. Whether I had a contract or not I would.

(Testimony of James Richard Bailey.)

Q. Yes. So that in this instance, if this was a defect, as we claim, and your men noticed it and said nothing about it, that would not be a performance of the contract, would it, in your opinion?

A. That would be an opinion.

Q. What?

A. I am not qualified to have an opinion on that.

Q. All right. Mr. Denecke asked you whether when you were still there on the ship, and before the accident happened, some of the crew of the ship were not working around the lifeboat after it had been lifted up into the cradle. You said some of the crew were working there about the boat?

A. Yes, sir.

Q. Among other things, they were putting the gripes on, weren't they? A. Yes, sir.

Q. I guess the Court understands it, but the gripes are straps that go around the boat both fore and aft and fasten to the davits so that it won't swing; is that right? A. Yes, sir.

Q. So in putting the gripes on the crew would not come anywhere near these hooks or links or dislodge them, would they?

A. Mr. Wood, I didn't hear you.

Q. I say, in putting the gripes on the crew wouldn't come anywhere near this link or hook or dislodge it, would they?

A. Well, it depends on what you consider near the gripes. The gripes go over, oh, approximately 18 inches—— [48]

(Testimony of James Richard Bailey.)

Q. I will put it like this: When the boat is swung up there into its cradle, it is still hanging with its weight on the davits, isn't it?

A. When it is brought home, it is still hanging on the davits; that is correct.

Q. So there is two tons of weight hanging on those davits fore and aft? A. Yes.

Q. That is where this hook and link were, at each end? A. Yes.

Q. Now you are not suggesting, are you, that because the crew put some stores in the boat or fastened the gripes that they could dislodge two tons of weight from those davits, are you?

A. No, sir; but you didn't carry it far enough. When the boat is up in position and pulled all the way back, it is hanging on the davits, but when they lower the boat down to the keel rest the boat is laying then on the keel rest. That is when they installed the gripes. And there was some discussion about how the boat fit on the keel rests, too.

Q. The boat always hangs with at least a large part of the weight on the davits, doesn't it—always? A. No, sir.

Q. Then I have been misinformed on that. I will have to inquire about that, I guess. [49]

A. A portion of its weight, let us say, but not a large portion.

Q. A portion of it, then. Can you apportion it as to how much weight would be on the davits?

A. It depends upon how much slack the Mate

(Testimony of James Richard Bailey.)

throws back when he lays it on the keel rests, Mr. Wood. It would be different every time.

Q. Are you suggesting that it is a reasonable possibility that the crew in putting some stores in the boat might have dislodged the link from the hook? A. No, sir.

Q. No. You suggested the possibility that the starboard gangway davit might have been projecting out enough so that when the boat was lowered the boat would momentarily hit that and perhaps take the weight off the davits and maybe do something to the hook. Was that the idea?

A. Yes, sir.

Q. That, again, you just suggest as a possibility?

A. It was only a suggestion; yes, sir.

Q. Now it is a fact, isn't it, that the Coast Guard regulations require that a lifeboat may be launched at all times free of the ship's side, even when the ship has got a list in the opposite direction up to 15 degrees? Is that a fact?

A. I am not aware of that regulation, sir.

Mr. Wood: I think that is in the testimony. I know it [50] is. It is in Patterson's deposition.

Q. Accept that as a fact. If the davits and the lifeboat and the launching gear are all so arranged that even if the ship had a 15-degree list to port still the starboard lifeboat could be launched free, that would nullify your suggestion about the gangway davit being an obstruction, wouldn't it?

(Testimony of James Richard Bailey.)

A. It was only offered as a suggestion, Mr. Wood.

Q. What?

A. It was only offered as a suggestion.

Mr. Wood: Thank you. That is all.

Mr. Denecke: No further questions.

(Witness excused.)

Mr. Denecke: Your Honor, I have no further witnesses except possibly the Coast Guard inspector, and your Honor suggested 10:00 in the morning, as I understand it.

The Court: Whatever time suits you gentlemen.

Mr. Denecke: That is fine.

Mr. Wood: I might put Mr. Toole on for a couple of short questions. [51]

CLYDE TOOLE

was recalled as a witness in behalf of the Plaintiff and was further examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Mr. Toole, what do you say about whether or not the weight of the boat when it is in the cradle is still suspended mainly on the davits?

A. I think it is mainly on the davits, mainly on the cables, because if the majority of the weight were sitting on the keel you wouldn't have a tendency for it to slide out as the ship rolled. You have keepers there to keep them in. That is why they have the gripes on, to take that weight when the

(Testimony of Clyde Toole.)

ship rolls. That is, I wouldn't care to try to make a guess as to the proportion of the weight that is on the keel or the portion of it that is on the cables, but I would say by far the majority of it is on the cables, because it will just touch, just so it slides in so as to barely touch the keel.

Q. Now, just to refute any possible suggestion that you may have known about this condition of the link and the hook, did anybody report this to you? I mean before the accident?

A. You mean the possibility of—

Q. No, did anybody report the fact that the keepers were separated from the hook and the hook was blunt before the [52] accident?

A. No, sir; I knew nothing of it.

Q. The Albina men made no such report to you?

A. No, sir.

Q. And you didn't know it?

A. No, sir; I didn't know it.

Mr. Wood: That is all.

Cross Examination

Q. (By Mr. Denecke): As I understand, Mr. Toole, you just came on board about—did you say five or ten minutes before the accident?

A. Yes, ten or fifteen minutes prior to that; yes.

Q. Prior to the accident? A. Yes.

Mr. Denecke: That is all, your Honor.

(Witness excused.)

(Thereupon an adjournment was taken until Tuesday, May 28, 1957, at 10:00 A.M.) [53]

Portland, Oregon—May 28, 1957

(Court reconvened, pursuant to adjournment, at 10:00 A.M., and proceedings herein were resumed as follows):

The Court: What was the name of the man who was the senior in the lifeboat?

Mr. Wood: Stene.

The Court: I mean in the repair.

Mr. Wood: John Stene.

The Court: The other fellow was a welder, wasn't he?

Mr. Wood: That is correct, your Honor.

The Court: Mr. Denecke, I wrote something that is quite brief last night, and I went over it again this morning. I am going to read it to you and ask if you want to comment on it. This is my provisional impression of this case:

The question is not, it seems to me, what inspection Albina was required to make. All agree that where a defect is found it is the custom of ship repairers to inform the shipowners and that the shipowners have the right to expect that such information will be given to them. Here the defect was found by Stene. He simply did not pass the information on to his superiors. Instead, they hurried him [54] off to do other work.

Do you want to talk on that?

Mr. Denecke: Yes, your Honor. I think I can talk without consulting my notes here.

I agree, your Honor, that that was Mr. Bailey's testimony, that it was usual and customary to report these things if they did find them.

First, your Honor, I don't think that there is a legal obligation to do so. I must admit that the law is not completely certain on that. This is one of those places in the Restatement of Torts where they have what they call a caveat. Now the caveat, your Honor, if I may read it here, says this:

"The Institute expresses no opinion that a contractor who fails to exercise reasonable care to inform his employer of a dangerous condition, which he is not employed to repair, but which he discovers in the course of making the repairs agreed upon, and of which he realizes that his employer is unaware, may not be subject to the liability stated in this section."

If I may paraphrase that, as I understand, they are saying they are not expressing any opinion where the contractor—in this case the ship repairer—has no direct contractual duty to inspect or report, but he finds [55] the condition and fails to report it. And they also say here that the caveat is when the condition is such that the employer—in this case it would be the shipowner—is unaware.

There are two things we think that change the facts here, your Honor, from what the Restatement was talking about. First of all, the only testimony in here is that the condition that existed is one that had existed for some time. How long no one could say. The plaintiff's answers to interrogatories say that no repairs or changes or anything had been made to this particular device since they purchased the ship, which was in '48 or '49. The testimony of Mr. Bailey was that he saw no evi-

dence of twisting or bending or widening of these particular guards. So, your Honor, I think the fact is that this condition existed long enough so the plaintiff should have known about it.

Secondly, your Honor,—the testimony has not been presented yet, but I expect it to be, that the guard is not an essential piece of equipment to hold the falls of the lifeboat; that there are some—I don't know whether there are many or not, but there are some lifeboats which have no guards, which simply depend upon the tension of the ropes, cables and falls there to hold the ring in place. It is admitted—or I think it is admitted—that on this [56] particular one the guards, which were an additional safety device, were not as they should be. But the point I am trying to make, your Honor, is that inasmuch as the guards were not absolutely necessary anyway, that this was not the kind of a defect which would suggest itself to be one of extreme danger because the tension on the falls is the primary thing that is going to keep the hook and swivel in there.

The last point, your Honor, is that if this were a case by the seamen against Albina I would be more concerned, perhaps—I should still be concerned, but more concerned about the statements of your Honor here. However, this is a case for indemnity, and it is practically admitted here that the ship was either negligent or was an unseaworthy ship, or at least was an unseaworthy ship because of this defective device. So it was either negligence or unseaworthiness initially which was

the cause of this tragedy. Secondly, your Honor, the depositions indicate that the ship was negligent subsequent to Albina leaving in failing to make any inspection of this device before they permitted the men in the boat.

So we have a situation where the ship before Albina entered into the picture had a defective device. Then after Albina got out of the picture the ship was again negligent in failing to perform what I think the testimony [57] will be a very crucial duty that the ship and the person in charge of the lifeboat should do, and that is to inspect to see that these falls are firmly secured.

So, your Honor, in an action for indemnity it would seem that if Albina were held to be negligent in failing to report, certainly the shipowner here would be at least a joint tort-feasor and would be barred from securing any indemnity.

The Court: Do you have other testimony?

Mr. Denecke: Yes, your Honor.

The Court: Put it on. [58]

C. H. ENDRESEN

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Denecke): Captain Endresen, you are in the United States Coast Guard stationed here in the Marine Inspection Branch at Portland, Oregon, are you not? A. That is right.

(Testimony of C. H. Endresen.)

Q. How long have you been in the Coast Guard, Captain Endresen? A. Since '42.

Q. Prior to that time were you in the Steamboat Inspection?

A. No. I was going to sea prior to that.

Q. How long have you been in Portland?

A. In Portland since '42, except one year. I was in San Francisco one year.

Q. Since '42 has the larger part of your duties been in inspecting ships upon the various inspections? A. Yes.

Q. Have you had occasion prior to 1955, when this accident occurred, to conduct at least over 20 or 30 lifeboat tests?

A. Yes, all kinds of them.

Q. You did conduct the lifeboat test on the Java Mail in April of 1955? [59]

A. That is right.

Q. I think we are all agreed, Captain Endresen, this accident happened in April of '55. Captain, I will hand you this book——

A. I have my own copy.

Q. I understand you have your own copy of what we refer to as Plaintiff's Exhibit 1?

A. Yes.

Q. Would you turn to Regulation 91.25-15.

A. Yes.

Q. In the first paragraph it says: "At each annual inspection the inspector shall conduct the following tests and inspections of lifesaving equip-

(Testimony of C. H. Endresen.)

ment." That inspector was you, Captain Endresen, in this particular instance? A. Yes.

Q. If it is not you, do I understand it is some other representative of the United States Coast Guard?

A. No, I was present during the whole annual inspection.

Q. Now, Captain Endresen, did you make an inspection of this lifeboat prior to the accident?

A. I did. I was in the boat during the annual inspection checking the equipment, and so on.

Q. And is an inspection of the hook and the ring a necessary part of your inspection?

A. It goes with the inspection. [60]

Q. Did you make some examination of this ring and hook?

A. I glanced at them and noticed them, yes.

Q. Would you state to the Court very briefly, Captain Endresen—the Court has heard some testimony on this—what the weight test consists of.

A. Well, the weight test is an annual test conducted to find out if the davits, falls, blocks and so on are strong enough to stand the weight of the boat and equipment, the number of persons times 165 pounds, which gives the total weight of the boat when loaded, fully loaded.

Q. Now do you determine in your capacity as inspector whether or not this test is satisfied and passed? A. That is right.

Q. And the ship repair yard does what in connection with the test?

(Testimony of C. H. Endresen.)

A. Well, they have an understanding or contract with the operator or the owners in regard to making repairs as a rule.

Q. Leaving out the repairs, Captain Endresen, and merely on the conduct of the test.

A. Well, no matter what is carried on it is generally between the owners and the contracting party.

Q. In this particular instance what did Albina do? See if I am correct, Captain Endresen: From your observation they put the sand in the lifeboat, and then did you give the [61] request to raise the lifeboat? A. No.

Q. When the sand was in it? A. No.

Q. Did you observe the raising of it?

A. Wait a while. We don't require the boat fully loaded with the sand to be raised. The boat is lowered down almost to the water and the sand is put in the boat. If they heave the boat up, that is on their own accord; not my authority. We don't believe in putting that strain on the gear.

Q. So the raising of the lifeboat with the sand in it is not necessary?

A. It doesn't concern me.

The Court: Why put the sand in, then?

A. Your Honor, it is a case of testing the falls, blocks, and so on, to see if they will hold the total load or the total capacity of the persons in the boat.

The Court: The sand is put in after the boat has been lowered to the water?

(Testimony of C. H. Endresen.)

A. Yes, sir.

The Court: Then the boat is not lifted with that added weight? A. Sir?

The Court: The boat is not lifted, then, with that added weight? [62]

A. We don't require that.

The Court: I don't see how that tests anything. The only thing I can see you are testing is whether it would sink the boat.

Mr. Denecke: May I ask a further question? Perhaps I can clarify it.

Q. Captain Endresen, after the sand is put in the boat, am I not correct that the boat is raised enough to put tension on the falls?

A. No, you have got it wrong. The boat is lowered down almost to the water. Then sandbags are put into the boat. Then the boat is lowered into the water, and the releasing gear is tested when the boat is afloat.

The Court: It is never lifted with that added weight at all?

A. No, that is not our requirement. If they do raise the boat with the weight in, that is their own responsibility.

Q. (By Mr. Denecke): Captain Endresen, have you examined and passed lifeboats that did not have these finger guards?

A. Yes. Pardon me, now. What do you mean by finger guards?

Mr. Denecke: Could I have Exhibit 2, please, Plaintiff's Exhibit 2?

(Testimony of C. H. Endresen.)

Q. Captain, I am looking at what is marked in LaVern Hinrichs' deposition as Plaintiff's Exhibit 3, which, as you see, is a picture of the lifeboat and the hook. [63]

A. Yes.

Q. And just below the hook there are two pieces of metal standing out.

A. That is a keeper.

Q. All right. Now have you examined and passed lifeboats which did not have keepers?

A. Well, yes. But they are different types of hooks. I think there is about four different types of releasing gears on the market, or there was. Some have them and some don't.

Q. In the type that does not have them, Captain Endresen, am I correct that the tension on the falls is what keeps the swivel or ring in the hook? Is that correct?

A. That is right.

Mr. Denecke: That is all, your Honor.

Cross Examination

Q. (By Mr. Wood): Captain, I am referring to your testimony just now that in making the weight test they lower the boat down but not to the water and then put the sand in it.

A. That is right.

Q. And I think we are all now confused about your testimony on that point, because the testimony in this case so far has been unanimous by everybody that they had to lower the boat [64] into the water, drift it back by No. 4 hatch, load the sand in it there, drift the boat back in the water with

(Testimony of C. H. Endresen.)

the sand in it, and then lift it. Don't you remember that that was the way it was done?

A. No, I didn't see them load that boat.

Q. You didn't see them load it?

A. I didn't see them put the sand in the boat, but they did take it out at No. 3 hatch.

Q. No. 4 hatch, wasn't it?

A. No, No. 3 hatch.

Q. Anyway, aft of the place where the accident happened?

A. No, they took it up to No. 3 and discharged the boat after the tests. If they raised the boat, that was on their own account, not my account, because I don't believe in it and don't require it.

Q. Albina was making the test, wasn't it?

A. Sir?

Q. Albina was making the test, wasn't it?

A. Yes.

Q. Now didn't they do as I said? Didn't they drift the boat back along the ship's side and put some sand in aft, and then bring the boat back in the water, hook up the falls and lift it out of the water with the sand in it?

A. Well, I didn't see that. When I got down to the ship at Terminal 4 the boat was hanging clear of the water at that [65] time. I didn't see them load the boat.

Q. Had the test been completed when you got there?

A. The boat was hanging ready for me when I got down there.

(Testimony of C. H. Endresen.)

Q. Then what happened?

A. I looked over the gear to see that everything was okeh and told them to lower the boat.

Q. What?

A. Lower the boat and throw the releasing gear, which they did, and it was all over with as far as the test was concerned.

Q. Then you didn't see any weight test made at all, did you?

A. Yes, the weight test was there when I got down there that morning.

The Court: It was hanging pendant?

A. It was hanging down when I got there.

The Court: Hanging pendant with the weight in it?

Q. (By Mr. Wood): The weight had already been put in? A. The weight was already in.

The Court: Then he saw them lower it to the water and operate the releasing gear. That is what he saw.

A. I will say this much: After the tests the ship put the lifeboat up alongside the No. 3 cargo gear and took the sandbags out. [66]

Q. (By Mr. Wood): Is that the last you saw of them?

A. That is the last I saw of them.

Q. You didn't see any of this operation, then, of bringing the boat back under the falls?

A. No, that was up to others; not me.

Q. Now, you said that this hook and the keep-

(Testimony of C. H. Endresen.)

ers, as you call them, were part of the lifeboat's equipment? A. Yes.

Q. And you glanced at them?

~~Q.~~ A. That is right.

Q. Will you tell me where you were and where the boat was when you glanced at them?

A. The boat was in the davits and I was in the boat.

Q. You were in the boat? A. In the boat.

The Court: And the sand was in the boat?

A. No. Pardon me, your Honor. The boat was up in the davits secured. That is when I was checking the equipment for the boats.

Q. (By Mr. Wood): You got into the lifeboat?

A. Yes.

Q. While it was suspended from the davits?

A. All the way home, with the gripes on it, secured.

Q. Was that after the test?

A. Before the test. [67]

Q. Before it was taken out of its cradle at all?

A. That is right.

Q. That is when you got in the boat?

A. Yes.

Q. And you looked at the equipment?

A. Yes.

Q. Including this hook and guards?

A. Yes.

Q. You glanced at it? A. That is right.

Q. And did you observe——

(Testimony of C. H. Endresen.)

A. I observed. That is all I do, is observe, you know.

Q. Did you observe that the guards were lowered from the point of the hook?

A. No, I didn't. I took them to be okeh then.

Q. You didn't observe that? You didn't observe that the point of the hook was blunt?

A. I seen the whole hook.

Q. I say, you didn't observe that it was blunted, the point of the hook?

A. Oh, yes; they are a little blunt.

Q. What? A. They are a little blunt.

Q. Did you observe that this hook was more blunt than usual?

A. Oh, I wouldn't say that, no. They are all made the same [68] pattern. All hooks are made the same.

Q. But the testimony of Stene was that by wear this hook had become blunt. What do you say about that? A. I didn't hear you.

Q. I said Mr. Stene testified that by wear this hook had become more blunt than ordinary. Did you observe that, that it was extra blunt?

A. Wait a minute. They are all the same. Those hooks are all the same as far as wear is concerned. I don't see how they could wear. There is no strain on the end of the hook.

Q. You didn't observe it, anyway?

A. Yes, I looked at it, sure.

Q. I mean you didn't observe any undue bluntness?

(Testimony of C. H. Endresen.)

A. Undue, no. But I will say, as I said before, that they are all the same pattern, made all the same.

Mr. Wood: I would like to make him my own witness for a question.

Q. Mr. Stene—he was the man in the boat, and he is an old sailor and Coast Guard man—testified that the hook at the end of the lifeboat remained solid and immovable at all times. I think he is mistaken about that, and I just want to clear it up for the Court. When the releasing gear or the trip, as he called it, is thrown and the release takes place, then the hook revolving on the hinge here comes up like that, does it not (illustrating)?

A. That is right.

Q. And that enables the link to slip out?

A. That is right.

Mr. Wood: That is all.

Redirect Examination

Q. (By Mr. Denecke): Captain Endresen, so I may be clear, you made the inspection of the gear and equipment in the lifeboat before the sand was put in it? A. Oh, yes.

Q. The same day, but before the sand was put in it? A. No, not the same day.

Q. Oh, excuse me.

The Court: When?

A. On April 5th, 1955.

Q. (By Mr. Denecke): Mr. Wood asked you whether or not Albina was making the test. You

(Testimony of C. H. Endresen.)

determined whether or not the lifeboat was in accordance with the regulations, did you not?

A. That is right.

Mr. Denecke: That is all, your Honor.

Mr. Wood: That is all.

(Witness excused.) [70]

JOHN W. DOPP

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Denecke): Captain Dopp, you live in Portland, Oregon, and you are licensed all oceans as a Master? A. Yes.

Q. How long have you been a Master?

A. I have held Master's papers for a little over 20 years—no, just 20 years. I have been Master since 1940.

Q. Are you at present acting as a relief Master and spending quite a lot of time on shore?

A. Yes. I am relief Master for West Coast Steamship Company.

Q. Can you tell us, Captain Dopp, what the duties are of a ship's officer or a seaman who is in charge of a lifeboat before the lifeboat is lowered or before men are permitted to go in the lifeboat?

A. Well, it is his duty to see that it is hooked up and that nothing will cause any delay in the davits going down; that it is all clear and that the men are in the boat as they should be before it is even started to be lowered.

(Testimony of John W. Dopp.)

Q. How should the men be in the boat, Captain Dopp?

A. Well, there is normally one man at each end, and he is to man the ropes and then he is supposed to see that the [71] releasing gear arm is locked and that the falls are clear.

Q. Are there any special duties with reference to the hooks and the releasing gear and the connection to the falls?

A. Well, everybody when they go into the lifeboat—the two men, the seamen that you send in there, is for the purpose in reality of making sure that they are connected properly, and the man in the after end of the boat, where the releasing arm is, sees that the pin is in there and that it is over there so there is no chance of it falling.

Mr. Denecke: That is all, your Honor.

Mr. Wood: That is all. No questions.

(Witness excused.)

Mr. Denecke: That is all.

The Court: I will hear you now, Mr. Wood. I will hear you in argument now.

Was this ship a freighter?

Mr. Denecke: Yes, your Honor; I think it was a C-2.

The Court: Did it carry any passengers?

Mr. Denecke: Mr. Toole indicates that it did on occasion.

Mr. Clyde Toole: It was a C-3 and carried 12 passengers.

The Court: Was it customary to carry passengers?

Mr. Toole: Yes, sir. We have accommodations for 12 passengers. [72]

Mr. Wood: As I remember, your Honor, there has never been any formal order entered that I know of consolidating these two cases for trial. Could I ask that an order be made now?

The Court: So ordered.

Mr. Wood: Before I begin my argument, which will be brief, I want to call attention to one place in the deposition of Patterson which, unless explained, might be a little confusing. Mr. Denecke, you can look with me at this, and I know you will agree on it. At the bottom of Page 9, the last line, Patterson is testifying—he was the Third Mate—and the question is, “And you were on the boat” and then he was interrupted. There should be written after “boat” the word “deck.” He never was in the boat at all. He was up on the boat deck. If the word “deck” were written after “boat” and before the word “interrupted” it would be clearer, because his next answer is, “Yes,” on the next page. He never was in the boat. He was on the boat deck.

Mr. Denecke: I would agree to that addition, your Honor.

Mr. Wood: Another thing that should be stipulated, your Honor, is that Mr. Denecke and I have agreed that the contentions in the pre-trial order that I made as to the sums paid and the amount of damages are agreed upon. If [73] there is liability, I don't have to offer proof of those amounts.

Mr. Denecke: So stipulated.

Mr. Wood: If your Honor please, it seems to me the real issues reduce themselves to fairly simply terms. Was there a contract? What was the contract? And was it breached?

First I will discuss the contract. Now it was agreed orally between Mr. Clyde Toole and Mr. Bailey that this lifeboat weight test should be made, and the specifications were written up after the accident. They were written up in the same form as had been used on previous tests by the same Albina company, and the same form as later tests, so it was the customary and usual form and was understood.

I will read it. It is on Page 2 of the specifications dated April 7, which is part of Exhibit 3, and the language is:

“Annual Inspection continued. Item No. 30.

“Weight Testing—Port and Starboard Lifeboats and Equipment.

“Furnish weight, 165 pounds per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard Lifeboats, Cable, Davits, etc. [74]

“Note: To be accomplished to satisfaction of U.S.C.G.”

Now, after this work was done Albina billed the steamship company for this work, including this very test, and they used exactly the same language on their bill. I won't repeat it. The only difference is that the note is it is no longer to be accomplished to the satisfaction of the U. S. C. G., but it is now accomplished to their satisfaction. But the language is the same.

There was a test of the boat and the equipment. Captain Endresen just now stated, which I think was perfectly honest of him, that this hook and the keepers were a vital part of the boat's equipment and the safety of everybody in the boat when it was being raised or lowered depended on it, and it was a vital thing to test and inspect and report on. I won't call it quibbling, but some little controversy was indulged in about whether Albina had to inspect this equipment. I think obviously if they are making a test they have got to make at least a visual inspection. I don't mean they have got to take it to a laboratory and test the metal, but I think in making any test it is common sense to make a visual inspection. But, regardless of that, as your Honor observed, we don't have to rely on a technical inspection. The man Stene saw this defect. He was an old seaman and he was an old Coast [75] Guard man. He knew it was a defect and risky. He did nothing about it. He left the boat as quickly as he could, climbed up the Jacob's ladder and off he went. He didn't report it to anybody and nobody knew about it.

Now, it was suggested in Mr. Denecke's argument a moment ago that the ship should have known about it. I don't know whether they should or not. A boat is not used so terribly often, and I don't know how long this thing had been in this dangerous condition. Nobody else does.

The Court: As I was saying to Mr. Denecke, I don't see what difference that makes, whether they should have known about it or not. You are not say-

ing they did know about it. You are saying they should have known about it. I don't see what difference that makes. This is a contract case.

Mr. Wood: That is right.

The Court: If not an express contract, in the nature of an implied contract; perhaps even implied in law. Furthermore, I am struck with the fact that that is what you hire repairmen for, is to find things that are wrong with your equipment.

Mr. Wood: That is right. And I will add why should it be said that the ship should know about this, when Captain Endresen says he casually looked at it and didn't observe it. [76]

The Court: As between the ship and its seamen, that is another question.

Mr. Wood: Yes, that is right.

The Court: Unseaworthiness means absolute liability, which is simply saying that if it doesn't hire enough repairmen to do good repair jobs it has got to pay the bills for the seamen.

Mr. Wood: Both Mr. Bailey and Mr. Toole—I think even Stene, though I am not sure of that—but the two principals say that if a defect like this is found it is the obligation of the repairmen to tell the shipowner about it, so the shipowner can give an order and say, "Fix it up and I will pay for it." But no such report was made. It is admitted that it is the common practice—Mr. Bailey said—that if a defect of this kind is noted it should be reported, and that makes it an implied part of this contract, if not expressed.

Now there is no question about it being the cause of the accident. Well, I will have to modify that. There are two possible causes of the accident, but there are only two. One is that Stene may be mistaken when he says he fastened the link snug up into the hook like that. He may be mistaken about that. He may have left it with the point of the hook on the link. I don't really think he did, because his testimony was explicit—and he was an honest [77] man—that he didn't do that. Then the only other possible cause is the one that he testified about, that the boat was left choppy in the water, jiggled things around there, and got in this position and then because of this fatal defect which was not reported the accident happened.

I think that it is a plain contract, a plain breach of it, and the damages were the plain consequence of it.

Now, I don't know that I need say anything about Mr. Denecke's contention that the Mate should have examined this equipment just before the boat was lowered to see that the link was in the hook, as the Captain, the last witness, said it was his duty to do.

The Court: That, again, is tort law.

Mr. Wood: That is what I was going to say. I don't think it has anything to do with the case. If it did, it is completely answered by the Supreme Court's decision in the Ryan case, where you remember the stevedores loaded these big rolls of paper in a bad fashion and they rolled over and hurt a man badly. The ship was sued and paid, and

then claimed over against the stevedore for breach of contract, just as here. And the Supreme Court upheld that claim notwithstanding the fact that the Mate of the ship had not inspected these rolls to see how they were stowed. It is just the same identical thing here. [78]

And even if it were a fact that we should have inspected it, it would not make any difference. It would be a passive neglect and would not have anything to do with the breach of the contract.

I think that is all I have to say, your Honor, unless I could explain any of these exhibits.

The Court: I am not impressed with that caveat, Mr. Denecke. As a generality, it may be all right, but here is a very serious safety matter here. Here are 66 people, including 12 lay people, men, women and children, at sea and the lifeboat turns out to be not safe. It is not safe because some things have not been done that should have been done when it was in a repair yard. I am much influenced by special circumstances of marine disasters. If a wheel comes off of an automobile—and that happened to me when I drove one too long—you may have to go in the ditch. But if you have got to take people off of a ship in extreme circumstances, and you have got a lifeboat that won't work, that is something else. That is serious.

Now go ahead. I know I am making this pretty hard for you, but I think I have to be frank with you at this stage of the case and tell you what my feelings are. But that does not mean that I won't hear you fully orally or even in writing.

Mr. Denecke: Your Honor, in view of the [79] Court's remarks, at this time I am orally not going to dwell any longer on this matter of the caveat. But I want to remind the Court again that this is a suit for indemnity, the same kind of suit that has been facing the Court here, as well as elsewhere—I mean basically the same kind—by the shipowner against the stevedore. True, it is a contractual matter. However, this Court, the Ninth Circuit and the Supreme Court have specifically said that if these are joint tort-feasors there is no indemnity.

Now, your Honor is, I am sure, familiar with Judge Fee's opinion in the *Amerocean* case about two months ago. I won't by any means read it all, but it says:

"That the stevedore is liable in an indemnity action where the liability of the shipowner is established solely upon the ground of unseaworthiness, while there is a finding of active negligence upon the part of the stevedore, has been accepted in many Federal Courts."

In other words, your Honor, as I understand it, he is saying that some Courts have held if the shipowner's only liability is unseaworthiness and the stevedore has been found guilty of active negligence, then many Federal Courts have held that the shipowner could recover indemnity against the stevedore. However, Judge Fee says that he is not accepting that particular premise. He says: [80]

"When two parties jointly and concurrently breach a duty each owes to a third person and damages results to him, each is liable to the full extent

thereof. Each had committed a wrongful act. Both are equally guilty of wrongful conduct.”

Now in this particular case, your Honor, I am going to assume for the moment, in view of the Court’s remarks, that Albina was negligent; that they had a legal duty to report and that they failed to report. Now that would leave us, your Honor—this case is entirely different from the Ryan case. In the Ryan case the stevedore created the unseaworthiness. There is no allegation here, of course, and the facts bear out that the unseaworthiness was not created by the ship repairmen. So here is an unseaworthy condition which the ship repairer had nothing to do with creating.

Let’s assume, then, that the ship repairer has failed in his legal duty to report to the shipowner that there was something wrong here, that there was a defect. Now, your Honor, a third act enters in here. Captain Dopp testified—I don’t think there could have been found any rebuttal to this testimony—that it is the duty of the person in charge of the lifeboat to examine and particularly to examine to see that the falls are connected up safely with [81] the lifeboat. I think without any nautical training that would be an essential and anyone would know that whether they knew anything about seamanship or not.

The shipowner now is asking for full indemnity, even though they created the unseaworthiness or

allowed it to exist, and then they failed to perform their duty of inspecting this lifeboat. And if they had inspected it, your Honor, the lifeboat would *have down* perfectly all right, as far as we know, and nothing would have occurred.

So it seems to me, your Honor, that at most the shipowner here can only rise to being a joint and concurrent tort-feasor with Albina, and if that is true the cases seem quite well established that there can be no indemnity.

Why should Albina, your Honor, bear the brunt of this because their man failed to report something when the ship at a subsequent time, when the men were going in the lifeboat, failed to perform an equal essential duty to look to see whether the lifeboat was hooked up correctly.

Mr. Wood: I haven't much more to say, your Honor. I don't need to say to your Honor this is not a tort case. This is not a case where joint tort-feasors are involved. It is a plain case of breach of contract. While it is true most of the damages sought are by way of damages in indemnity, that does not change the case at all. It is a suit for damages, not only damages caused for money we had [S2] to pay out but for repairs we had to pay for caused by their breach of contract.

As I said before—and I won't labor the point—the Ryan case, which was a contract case where the ship was passively at fault and negligent, just as we were here, for not inspecting the things just be-

fore the boat was lowered—the Ryan case is a complete answer to this. I don't think it makes any difference, but, as a matter of fact, Mr. Patterson, the Third Mate, said that once the boat is raised up into the cradle, hanging on the hooks and from the davits, that practically its full weight is on the hook and it cannot get out of that hook if the hook is properly placed. The hook is up above them, and they can't see it. They don't look at the hooks; they rely on the fact that the man who has last placed the hook, which in this case was Albina, placed it with the link properly in it, and with the boat hanging there ever since it could not get out. They rely on that.

The Court: I will want this testimony, including the closing arguments, transcribed. Then within 30 days after Mr. Beckwith has furnished the transcript and made it available to you gentlemen, I wish you would brief your position, Mr. Denecke, and then I will let you have 30 days, Mr. Wood, after that if you wish to answer.

(Whereupon proceedings in the above matter on said day were concluded.) [83]

[Endorsed]: Filed June 12, 1957.

CARGO AND MISCELLANEOUS VESSELS

§ 91.25-20 (a) (2)

91.25-5 When made

91.25-5 (a) The annual inspection will only be made upon the written application of the master, owner, or agent of the vessel, on Form CG 833, to the Officer in Charge, Marine Inspection, at or nearest the port where the vessel is located.

91.25-10 Scope of inspection

91.25-10 (a) The annual inspection shall include an inspection of the structure, boilers, machinery and equipment. The inspection shall be such as to insure that the vessel, as regards the structure, boilers and their appurtenances, piping, main and auxiliary machinery, electrical installations, lifesaving appliances, fire-detecting and extinguishing equipment, and other equipment, is in satisfactory condition and fit for the service for which it is intended, and that it complies with the applicable regulations for such vessel, and that the radio installation is in compliance with the requirements of the Federal Communications Commission. If equipment is installed that is not required, such as fire-detecting systems, etc., such equipment shall be inspected and tested as required by Subpart 71.25 of Subchapter H (Passenger Vessels) of this chapter.

91.25-15 Lifesaving equipment

91.25-15 (a) At each annual inspection, the inspector shall conduct the following tests and inspections of lifesaving equipment.

91.25-15 (a) (1) It shall be demonstrated that the air tanks of all lifesaving appliances are airtight.

91.25-15 (a) (2) If practicable, each lifeboat shall be lowered to near the water and then be loaded with its allowed capacity, evenly distributed throughout the length, and then be lowered into the water until it is afloat, and be released from the falls. In making this test, persons or dead-weight may be used. The total weight used shall be at least equal to the allowed capacity of the lifeboat considering persons to weigh 165 pounds each.

91.25-15 (a) (3) Each life preserver shall be examined to determine its serviceability. If found to be satisfactory, it will be stamped "Passed," together with the date, the port, and the inspector's initials. If not in a serviceable condition, the life preserver shall be removed from the vessel's equipment, and if beyond repair, shall be destroyed in the presence of the inspector.

91.25-15 (a) (4) All lifeboat winch electrical control apparatus shall be opened up and inspected.

91.25-15 (a) (5) Where gravity davits are installed, it shall be demonstrated that the lifeboat can be swung out and lowered from any stopped position by merely releasing the brake on the lifeboat winch. The use of force to start the davits or the lifeboat winch will not be permitted.

91.25-15 (a) (6) All other items of lifesaving equipment shall be examined to determine that they are in suitable condition.

91.25-20 Fire extinguishing equipment

91.25-20 (a) At each annual inspection, the inspector shall conduct the following tests and inspections of fire extinguishing equipment:

91.25-20 (a) (1) All hand portable fire extinguishers and semiportable fire extinguishing systems shall be checked as noted in Table 91.25-20 (a) (1). In addition, the hand portable fire extinguishers and semiportable fire extinguishing systems shall be examined for excessive corrosion and general condition.

TABLE 91.25-20 (a) (1)

| Type unit | Test |
|---|---|
| Soda acid..... | Discharge. Clean inside and hose thoroughly. Recharge. |
| Foam..... | Discharge. Clean inside and hose thoroughly. Recharge. |
| Pump tank (water or antifreeze). | Discharge. Clean inside and hose thoroughly. Recharge with clean water or new antifreeze. |
| Cartridge operated (water antifreeze or low- ed stream). | If pressure cartridge is punctured, or if it weighs ½ ounce less than amount stamped on cartridge, it shall be replaced. Remove liquid. Clean inside and hose thoroughly. Recharge with clean water or new solution or antifreeze. Insert charged cartridge. |
| Carbon tetrachloride.. | Discharge a few strokes into a clean container. Recharge with new or discharged liquid. Keep water out of extinguisher. Ascertain that it is completely full of liquid. |
| Carbon dioxide..... | Weigh cylinders. Recharge if weight loss exceeds 10 percent of weight of charge. Inspect hose and nozzle to be sure they are clear. |
| Dry chemical..... | If pressure cartridge is punctured, or if it weighs ½ ounce less than amount stamped on cartridge, it shall be replaced. Inspect hose and nozzle to be sure they are clear. Insert charged cartridge. Ascertain that chamber contains full charge and that powder is not caked. |

91.25-20 (a) (2) Fixed fire extinguishing systems shall be checked as noted in Table 91.25-20 (a) (2). In addition, all parts of the fixed fire extinguishing systems shall be examined for excessive corrosion and general conditions.



TABLE 91.25-20 (a) (2)

| Type system | Test |
|------------------|--|
| m..... | Systems utilizing a soda solution shall have such solution replaced. In all cases, ascertain that powder is not caked. |
| bon dioxide..... | Weigh cylinders. Recharge if weight loss exceeds 10 percent of weight of charge. |

91.25-20 (a) (3) On all fire extinguishing systems, all piping controls, valves, and alarms shall be checked to ascertain that the system is in operating condition. In this respect, steam smothering lines shall be checked with at least a 50 p. s. i. air pressure with the ends capped or by blowing steam through the lines at the designed pressure.

91.25-20 (a) (4) The fire main system shall be operated and the pressure checked at the most remote and highest outlets. All fire hose shall be subjected to a test pressure equivalent to the maximum pressure to which they may be subjected in service, but not less than 100 p. s. i.

1.25-25 Hull equipment

91.25-25 (a) At each annual inspection, the inspector shall conduct the following tests and inspections of hull equipment:

91.25-25 (a) (1) All watertight doors shall be operated locally by manual power and also by hydraulic or electric power if so fitted. Where remote control is fitted, the doors shall also be operated by the remote control apparatus.

91.25-25 (a) (2) The remote controls of all valves shall be operated.

1.25-30 Electrical engineering equipment

91.25-30 (a) For inspection procedures of Electrical Engineering equipment and systems, see Subchapter J (Electrical Engineering) of this chapter.

1.25-35 Marine engineering equipment

91.25-35 (a) For inspection procedures of Marine Engineering equipment and systems, see Subchapter F (Marine Engineering) of this chapter.

1.25-40 Sanitary inspection

91.25-40 (a) At each annual inspection the quarters, toilet and washing spaces, galleys, serving pantries, lockers, etc., shall be examined by the inspector to be assured that they are in a sanitary condition.

1.25-45 Fire hazards

91.25-45 (a) At each annual inspection, the inspector shall examine the tank tops and bilges in the machinery spaces to see that there is no accumulation of oil which might create a fire hazard.

91.25-50 Inspector not limited

91.25-50 (a) Nothing in this subpart shall be construed as limiting the inspector from making such tests or inspections as he deems necessary to be assured of the safety and seaworthiness of the vessel.

91.30 INSPECTION AFTER ACCIDENT

91.30-1 General or partial survey

91.30-1 (a) A survey, either general or partial, according to the circumstances, shall be made every time an accident occurs or a defect is discovered which affects the safety of the vessel or the efficacy or completeness of its lifesaving appliances, fire-fighting or other equipment, or whenever any important repairs or renewals are made. The survey shall be such as to insure that the necessary repairs or renewals have been effectively made, that the material and the workmanship of such repairs or renewals are in all respects satisfactory, and that the vessel complies in all respects with the regulations in this subchapter.

91.35 SANITARY INSPECTIONS

91.35-1 When made

91.35-1 (a) An inspection of quarters, toilet and washing spaces, serving pantries, galleys, etc., shall be made at least once in every month. If the route of the vessel is such that it is away from a United States port for more than one month, an inspection shall be conducted at least once every trip.

91.40 DRY DOCKING

91.40-1 When dry docked

91.40-1 (a) All vessels shall be placed in dry dock or hauled out for examination within the periods set forth in this paragraph depending upon the service.

91.40-1 (a) (1) Vessels whose operations in salt water service aggregate more than 6 months in a calendar year—once in each year.

91.40-1 (a) (2) Vessels whose operations in salt water service aggregate 6 months or less in a calendar year—once in each 2 years.

91.40-1 (a) (3) Vessels whose operations are confined exclusively to fresh water—once in each 5 years.

91.40-5 Notice by owner

91.40-5 (a) The master, owner, or agent shall notify the Officer in Charge, Marine Inspection, when any vessel is to be placed on a dry dock in order that an examination of the underwater portion

PLAINTIFF'S EXHIBIT No. 2

[Title of District Court and Cause Nos. 8459-8787.]

DEPOSITION OF LaVERN R. HINRICHS

taken in behalf of Plaintiff.

Be It Remembered That, pursuant to the stipulation of counsel for the respective parties hereinafter set forth, the deposition of LaVern R. Hinrichs was taken in behalf of [1]* the Plaintiff in the above-entitled consolidated causes before John S. Beckwith, a Notary Public for Oregon and an Official Reporter of the above-entitled Court, on Wednesday, December 5, 1956, beginning at the hour of 3:00 p.m., at the law offices of Messrs. Wood, Matthiessen, Wood & Tatum, 1310 Yeon Building, Portland, Oregon.

Appearances: Mr. Erskine Wood, of Attorneys for Plaintiff. Mr. Arno H. Denecke, of Attorneys for Defendant.

Mr. Wood: It is hereby stipulated that the testimony of this witness, LaVern R. Hinrichs, may be taken before John S. Beckwith, a Notary Public for Oregon and an Official Reporter of the above-entitled Court, at this time and place; that said deposition shall be transcribed and may be read in evidence at the time of trial the same as if the witness were present and testifying in person, all objections being reserved to the time of trial except as

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

to leading questions or as to the competency of the questions.

It is further stipulated that the reading of the deposition and the signature of the witness are waived, subject to his approval.

Mr. Denecke: So stipulated. [2]

LaVERN R. HINRICHS

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wood): Mr. Hinrichs, you may state your full name.

A. LaVern Richard Hinrichs.

Q. Your age? A. 29.

Q. Your address?

A. 11213 Lake Steilacoom Drive, Southwest Tacoma, Washington.

Q. Are you married? A. Yes.

Q. Have you any children? A. Yes.

Q. How many? A. Two.

Q. You are a seaman by occupation, are you not? A. Yes.

Q. How long have you been going to sea?

A. Since 1945, except for two years I was in the Army, from '51 to '53.

Q. You are a seaman at the present time?

A. Yes, I am.

Q. With the rating of A.B.? [3]

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

A. A.B., lifeboat man.

Q. Are you a certificated lifeboat man?

A. With your A.B. papers you have to hold a lifeboat ticket.

Q. At present you are attached to the Steamship China Mail, aren't you? A. Yes, I am.

Q. Here in this port at present? A. Yes.

Q. You are about to sail from here tomorrow, I think? A. Yes.

Q. At the time that the No. 1 lifeboat fell on the Java Mail, which I believe was April 7th, 1955, you were present on that occasion, weren't you?

A. Yes, I was.

Q. The lifeboat fell during the course of lifeboat drill, didn't it? A. Yes.

Q. And before that there had been a weight test made on it by the Albina Engine & Machine Works people, had there not?

A. Yes, there was a test on it.

Q. Were you working about the decks during that weight test?

A. Through some of it, yes.

Q. What part of that weight test did you notice and remember? [4]

A. The main part of it was when the lifeboat was back at No. 4 and they were taking the sandbags out of it with the winch.

Q. That is, they had presumably lifted the boat with the sand in it, which you don't particularly

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

remember, and then they had taken it back to No. 4 to discharge the sand; is that right?

A. That is right.

Q. That is what you saw?

A. That is what I saw, the discharging of the sand.

Q. Then was the boat brought back after the sand was discharged and put under the davits?

A. Yes.

Q. Did you see Albina men in the boat at that time, when it was brought back under the davits?

A. Yes.

Q. I don't mean that you observed particularly how they hooked it on, or anything like that, but in general did you see them hooking the boat falls onto the hooks of the boat?

A. Well, I mean I didn't actually look down and look at them, but I mean they were in the boat underneath the falls so therefore they was hooking it up.

Q. Do you recollect any conversation from anybody on the deck down to the Albina men in the boat about hooking it up?

A. Well, I am not sure, but I think it was Whitey Hansen— [5]

Q. Who is Whitey Hansen?

A. He was an A.B. on the ship, my watch partner.

Q. What did he say?

A. Jokingly he hollered down to the guy in the

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

boat and he says, "Be sure and hook it up good." And this other fellow says, "Don't worry about Shorty"—I believe the word was Shorty——

Q. Who was the other fellow?

A. I don't know who he was.

Q. I mean was he a man in the boat or a man on the deck?

A. I believe he was on the deck, but he wasn't one of the crew.

Q. He was an Albina man, was he?

A. Must have been an Albina man.

Q. What did he say?

A. He said, "Don't worry about Shorty. He will hook it up. He is an old seaman."

Q. Shorty being one of the men in the boat?

A. That is who he referred to.

Q. Do you remember the boat being lifted up and swung into the cradle?

A. No. I walked off right after that. It was in the process of coming up when I walked away.

Q. You walked away. And when you came back what next did you have to do with the boat? [6]

A. Well, I turned to and put the gripes on, secured the boat in the proper manner for the lifeboat drill. I put the gripes on the after end of the boat.

Q. When you came back was the boat already swung into the cradle?

A. Yes, it was. It was already in the cradle.

Q. You helped put the gripes on?

A. Yes, on the after end.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

Q. By the way, when the lifeboat is in the cradle, swung in there, is the weight of the boat still on the hooks? Is the boat still suspended with its weight on the hooks? A. Yes.

Q. Even after it is in the cradle?

A. Yes, there is weight on the hooks after she is in the cradle.

Q. Now after you had secured the gripes or helped put the gripes on, then I believe you went away for coffee, didn't you?

A. It was coffee time, yes.

Q. Then after you came back from coffee time what next occurred?

A. Well, they blew the signal for fire drill, which I went to, and then after fire drill they blew the signal for lifeboat drill.

Q. You came to that lifeboat drill? [7]

A. Yes.

Q. What particularly did you have to do with it first? A. In what respect?

Q. I believe you told me that the Mate told you to get in the boat and check the plug, or something like that.

A. Yes. I was standing there and the Third Mate says, "Get in the boat and check the plug."

Q. Did you do it? A. Yes, I did.

Q. Was the boat still in the cradle at that time, or do you remember?

A. No, I believe it was just swung out enough

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

so that you could step into the boat without having to crawl clear up on the davit to get in.

Q. Then after you checked the plug—so that we all understand that, what is the plug for?

A. Well, it is so that you can drain the water out of the boat when you bring it aboard, if there is any water in it.

Q. So before putting it back in the water you would have to be sure the plug was back in place?

A. Yes.

Q. Is that what you were doing?

A. Yes.

Q. Then after the plug was checked by you was the boat lowered away? [8]

A. Yes, they started to lower the boat away.

Q. Did you remain in it? A. Yes, I did.

Q. Who was with you?

A. At the other end was Lord Nelson.

Q. Which end were you in?

A. The after end.

Q. Is Lord Nelson the man who had his leg hurt and amputated? A. Yes.

Mr. Denecke: "Lord," I take it, is a nickname?

A. That is a nickname. I don't know his first name.

Q. (By Mr. Wood): Now as the boat was lowered down toward the water what next happened?

A. Well, they discovered there was no rudder in it, so they stopped lowering it.

Q. After it had been lowered partway down?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

A. Yes.

Q. When they discovered there was no rudder in it did the Mate tell them to stop or what?

A. Well,—

Q. Anyway, they stopped lowering it?

A. They stopped lowering it, anyway.

Q. All right. Then when it was thus stopped in that manner it was sort of even with one of the decks, wasn't it? [9]

A. Yes, it was.

Q. Didn't some other men get in then?

A. That is when the Chinaman, Chan, and another A.B. by the name of Pete Flovik—they got aboard at that level.

Q. So Flovik got in the boat with the Chinaman?

A. Yes.

Q. So there were now four of you in the boat?

A. There was.

Q. Was Flovik standing next to you?

A. He was beside me, yes.

Q. Now we have got four of you in the boat and the boat has been stopped while they were going to get a rudder. Then what happened?

A. They started to raise the boat.

Q. Then what happened?

A. Then Pete kind of give me a nudge and he says—I don't know exactly what he said, but he pointed and I glanced over and I could see the ring on the hook was just on the very edge, and I hol-lered, "Stop," to stop the boat, and just then it

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

happened so fast the next thing I knew I was in the water.

Q. You say "it happened." What happened?

A. The after end of the ring slipped off of the hook. And it all happened so fast—I mean after we noticed it it was just a matter of just as fast as you could say it happened, and the next thing I knew I was in the water. [10]

Q. In other words, the ring slipped off the hook, the after end of the boat fell and you all fell with it?

A. Yes.

Q. Do you think you could draw any kind of a rough diagram illustrating in a rough way how that swivel link was balanced on the top of the hook?

A. I can try. It will be rough, but I can try.

Mr. Denecke: I have some pictures here. Either one of these you might be able to use. I think we have both got the same pictures.

Mr. Wood: I think we have, too. Just let him make a little drawing, and then we will use the pictures, too.

(The witness drew a diagram as requested.)

Mr. Wood: I will ask you to continue drawing further up there. What is this round circular thing there?

A. That is a swivel with another ring.

Q. Then the fall continues up here, does it?

A. Yes, it shackles into the block.

Q. Just draw a little line showing it goes up. It goes up towards the davits, doesn't it?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

A. Yes.

Mr. Wood: I will have this marked for identification.

(The diagram drawn by the witness was marked by the Notary as Plaintiff's Deposition Exhibit 1 for identification.) [11]

Q. (By Mr. Wood): I think on this Plaintiff's Exhibit 1 for Identification the hook speaks for itself. This dotted line represents the link, does it?

A. The ring, yes.

Q. The ring that is supposed to connect with the hook? A. Yes.

Q. And when properly seated it is right up near the bend of the hook? A. Yes.

Q. But on this occasion it was just resting on the tip of the hook? A. Right.

Q. What did you say this circular thing was up here?

A. That is another ring with a swivel in there.

Q. Another ring with a swivel? A. Yes.

Mr. Wood: I think that is plain enough. I will offer it in evidence.

Would you mark that for identification.

(A photograph was marked by the Notary as Plaintiff's Deposition Exhibit 2 for Identification.)

Q. (By Mr. Wood): Mr. Hinrichs, I show you this Plaintiff's Exhibit 2 for Identification. That gooseneck hook there toward the top of the picture—I don't know whether you [12] call that a goose-

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

neck or not—that is the hook we are talking about, is it not? A. Yes, it is.

Q. That is a picture of it? A. Yes.

Q. And the end of this chain or series of links here at the right of the picture resting on that board, what is that end link that I am pointing at?

A. That is the ring that goes into the hook.

Q. That is the one that connects with the hook when it is properly seated? A. Yes.

Q. You notice on this picture here two little keepers or guards, I call them. Do you see them?

A. Yes, the fingers there.

Q. Fingers. Is that what you call them?

A. I guess. I never actually knew the normal phraseology.

Q. What are they?

A. They are supposed to be a safety catch.

Mr. Wood: I will offer that in evidence.

Mark this photograph for identification.

(A photograph was marked by the Notary as Plaintiff's Deposition Exhibit 3 for Identification.)

Q. (By Mr. Wood): I show you Exhibit 3 for Identification [13] and ask you if that is another picture of the same hook in the lifeboat with the safety catches attached? A. Yes.

Mr. Wood: I will offer that in evidence.

Would you mark this?

(The photograph was marked by the Notary

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

as Plaintiff's Deposition Exhibit 4 for Identification.)

Q. (By Mr. Wood): Now, Mr. Hinrichs, I know that you didn't have anything to do with the releasing gear, and it will probably be testified to by other witnesses, but as long as you are here I will ask you to look at that picture. Is that a picture of the releasing gear on the bottom of the lifeboat?

A. Yes, that is.

Mr. Wood: I will offer that in evidence.

Mark this picture, please.

(The photograph was marked by the Notary as Plaintiff's Deposition Exhibit 5 for Identification.)

Q. (By Mr. Wood): I show you Exhibit 5 for Identification, merely for the purpose of showing the location of the hook at the end of the lifeboat. Does that show that? A. Yes.

Q. At the right-hand side of the picture as you are looking [14] at it the hook there is at the point of the lifeboat—I don't know whether it is the bow or stern, but it is one end of the lifeboat, isn't it?

A. Yes, it is the stern end of the lifeboat.

Mr. Wood: I will offer that in evidence.

Q. You don't remember what Flovik said, the words he used as a warning?

A. No. My vision moved and I looked, and then I realized that there was a dangerous situation, so actually I didn't hear just what he said.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

Q. But you actually did see the link just poised on the tip of the hook? A. Yes, I did.

Q. You have a colored transparent photograph of yourself in the lifeboat taken just a moment before this happened, haven't you? I don't know whether you have it with you.

A. No, I wouldn't say exactly it was the moment, but it was within a few minutes or maybe a minute—I mean I don't know just when the picture was taken.

Q. But it was while you were in the lifeboat?

A. Yes, it was just before the accident.

Q. It was during the boat drill after you got in there and it was being lowered?

A. Yes, it was.

Q. That was taken by one of your shipmates?

A. Yes, it was.

Q. It has been in your possession and in your house, hasn't it?

A. It has been in my home ever since.

Q. You asked your wife to mail it down to us here? A. Yes, I did.

Q. By airmail. It was supposed to get here today? A. Yes.

Q. As I understand, it shows you standing up in the lifeboat? A. Yes.

Q. With your hand holding onto what?

A. A fall, a wire fall.

Q. When expanded it shows the link balanced

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

on the tip of the hook as we have discussed, does it not? A. Yes.

Mr. Wood: I think that is all.

Cross Examination

Q. (By Mr. Denecke): Mr. Hinrichs, this picture shows you with your hand on the fall. Was that the aft fall? A. Yes.

Q. Let me see if I have this straight. You got in the boat on the boat deck? [16]

A. I got in on the lifeboat deck, yes.

Q. Then you and somebody else got in at that time, you and Nelson? A. Yes.

Q. Then the boat was lowered about how far down?

A. Well, it was one of the two decks. I don't know which one it actually stopped on, but it was even with the deck because two other fellows boarded there.

Q. Then two other fellows got in; is that right?

A. Yes.

Q. Then was it at that position of the boat that somebody found out the rudder wasn't in there?

A. No, that is the reason the boat was stopped, was to get the rudder.

Q. Oh, I see. It was stopped at that deck to get the rudder, and then these two fellows got in?

A. Yes.

Q. Then was the boat moved at all from that position before it fell?

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

A. Yes, it was starting up.

Q. It was starting up. You were going to go back up to the lifeboat deck to get the rudder?

A. Yes.

Q. And it was on its way back up that she fell?

A. That is right. [17]

Q. Had you ever been in this particular lifeboat before?

A. No. My boat is on the other side, and it was dockside to, so you couldn't put that one in the water.

Q. Do you know, Mr. Hinrichs, looking at Plaintiff's Exhibit 2, whether or not it is possible to get this—what do you call that, a ring or swivel?

A. Ring.

Q. Link, I guess you call it? A. Yes.

Q. Do you know whether or not you can get that link off the hook with these fingers up?

A. You are not supposed to. That is why they put the fingers there.

Q. I understand that, but I wondered do you know whether on this particular lifeboat this one could go back and forth—by back and forth I mean on and off the hook—with the fingers up?

A. I don't know. I never tried it.

Q. How about on your regular lifeboat? Do you know on that?

A. Well, I never—every time I have taken it off these fingers they are down. I mean when you release the boat in the water. So I mean I can't actu-

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

ally say truthfully whether—you are not supposed to be able to take it in and out, because that is why they are there, but I couldn't truthfully [18] say. I mean I never tried it, to be truthful.

Q. In Exhibit 4 here, which is a picture of the releasing gear, is that in the closed position?

A. Right here?

Q. Yes.

Mr. Wood: As shown in the picture.

A. Yes.

Q. (By Mr. Denecke): It is in the closed position there? A. Yes.

Q. In the raised position or the open position, I should say, what happens?

A. You mean this here?

Q. Yes.

A. It pulls—I don't know whether it is a chain or cable in the bottom of the boat up into here, which releases——

Q. These fingers that you have described there?

A. Yes.

Q. How does this look when——

Mr. Wood: No, it doesn't release the fingers, does it? I thought it lifted——

A. It releases. There is a ball here that the hook ends in.

Mr. Wood: It raises the hook up like that, doesn't it?

Mr. Denecke: I don't think so.

A. It lets it fall back. I wouldn't say raises up.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

I mean [19] the hook—yes, it comes up with a pull here into here (indicating), which would let the hook come back so you can slip it out easy. I mean it—how would you explain it?—it is so when you hook it up again you can just set it there and just push this back into position again.

Q. Then, actually, is there a lever and it raises up—— A. Yes, that is a lever.

Q. And when it is in the open position this is raised up to practically a vertical position or somewhere close to that?

A. Yes, practically.

Mr. Wood: When you say “this” is raised up——

Mr. Denecke: I am referring to what is in the picture, Exhibit 4, which has the words “releasing gear” there.

A. There is a safety pin here.

Q. You have to pull the pin before you can raise her up there? A. Right.

Q. Just so we will know where the releasing gear is, would you show on Exhibit 5 where this releasing gear is which is shown on Exhibit 4? Does it show on there?

A. It should be down in here, but I don't think you can see it.

Q. Am I correct, Mr. Hinrichs, that normally it is between the last full seat and the bow or stern of the lifeboat? [20]

A. I am pretty sure it is located right in this

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

area, because different lifeboats have a different setup on them. But I am positive that it is in this area.

Q. Generally the one for the aft gear is close to the aft end?

A. Well, one of them releases on both ends.

Q. One of them releases both ends?

A. Yes, usually your after end, or wherever the coxswain or whatever you care to call him is, the man in charge of your lifeboat. That is where he is at.

Q. On this picture that Mr. Wood was mentioning do you remember where the lifeboat was when the picture was taken? In other words, was it still on the lifeboat deck or was it down on one of the other decks, where Chan got on?

A. No, I didn't even know it was taken until after, when he gave it to me. I didn't know the picture was taken.

Q. And the picture itself doesn't give you any assistance——

A. No, it just shows the boat.

Q. It is looking out from the ship?

A. Yes, he was on the ship when he took it.

Q. You mentioned something—I think you called them gripes—when the lifeboat was in the cradle?

A. Yes.

Q. Can you tell me very briefly what you do when you gripe the boat? [21]

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

A. Well, this type of gripe? I mean there are different——

Q. The one that was used on this boat.

A. The one that was used on this?

Q. Yes.

A. It is a wire that goes around the boat at both ends and has a turnbuckle with a hook, a pelican hook, so you can tighten or loosen it, and it is just to keep your boat from swinging, actually.

Q. Where is the hook attached, the pelican hook?

A. It is on the inboard side. It is on the davit itself. I mean there is—what do you call it—there is a platform.

Q. Will this picture show what you are referring to? A. Yes.

Mr. Denecke: I will have that marked for identification.

(The photograph referred to was marked by the Notary as Defendant's Deposition Exhibit 6 for Identification.)

Q. (By Mr. Denecke): This is Defendant's Exhibit 6, Mr. Hinrichs. Would you tell me where the pelican hook which is at the end of the gripes on this particular one hooked on?

A. You can't see the actual hook. It is in between this area and a cable that goes around the aft. Here is the turnbuckle [22] here.

Q. In other words, this is the turnbuckle that tightened that and the hook hooked onto this davit?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

A. No, it goes over a wheel-like and down. It is not part of the davit. I mean it is a wire to keep—when the ship rolls to keep the lifeboat from rolling in and out of the davit, this type of davit.

Q. When the ship is in the cradle there, is the keel resting on the cradle? Am I stating that fairly accurately?

A. You mean that the whole lifeboat is resting on the cradle?

Q. Yes.

A. Well, I wouldn't exactly say resting. It is against the cradle, yes. But this—we will call it the gripe—it holds the boat in so that it won't roll in rough weather. I mean it secures it into this part here, where you have a bumper there, and keeps the boat from rolling in rough weather.

Q. What I am calling the keel here of the lifeboat, is it resting on anything when it is in the cradle there?

A. Well, it is sitting on—what would you call it?—a notch-like here, yes.

Q. A notch which is part of the davit proper?

A. Yes.

Q. But I understand that it is still supported and suspended [23] by the falls?

A. This here has the majority of the weight, or otherwise it would bang around. I mean you tighten them. You have a winch at the other end, and when you get them secure she is tight.

Mr. Wood: When you say "this here has the

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

majority of the weight," it is not clear what you mean. What do you mean by "this here has the majority of the weight"?

A. This cable would be the actual fall.

Mr. Wood: If you will pardon the interruption. You mean the weight of the boat is still mainly on the hook?

A. Yes.

Mr. Wood: And the fall?

A. Yes.

Q. (By Mr. Denecke): From your statement there, when you get the thing in the cradle then they tighten up on this?

A. Well, it is tight.

Q. It is tight?

A. Because that is what brings it up—these run on a roller, and as it engages that pulls this up the arm of the davit, and therefore it is tight all the time. It has to be or else—I mean it wouldn't pull the davit up into position. Therefore you keep a strain on it at all times.

Q. Mr. Hinrichs, as I understood your testimony at the very beginning of your deposition, you were looking rather [24] casually and you saw them unloading sand?

A. I believe sandbags, yes.

Q. Or some sort of bags? A. Yes.

Q. They were unloading sandbags near the No. 4 hatch? A. At No. 4 hatch.

Q. At No. 4 hatch. Then when did you next see

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

the boat, the lifeboat? A. Up by the davits.

Q. Up by the davits?

A. The falls. The davits are way up on deck, but in that general area there.

Q. Do you know where the repair men, or at least the men that put the sandbags in and took them out again, were? Were they still in the boat?

A. There was two men still in the boat.

Q. And the boat was on the water then?

A. Yes, it was on the water.

Q. Then when is the next time you saw the boat? Did you see it actually raised?

A. No, I didn't.

Q. These pictures, Exhibits 2 through 6, they are all pictures of the actual lifeboat that we are concerned with, aren't they?

A. As far as I know. [25]

Q. At least, it appears that they are?

A. It looks like the same boat, with the oil spills and stuff.

Q. Have you worked ships before having a similar type lifeboat? I don't mean an identical one but a similar type? A. Yes.

Q. Including a similar type of releasing gear? And again I am talking about the type.

A. Yes.

Mr. Denecke: I have no further questions.

Redirect Examination

Q. (By Mr. Wood): There are just two points

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

about your testimony that are not quite clear, I think. You said that the boat, after having stopped to get the rudder, was being lifted when it dropped. You told Mr. Denecke that. A. Yes.

Q. Unless that is further explained, it sounds as if it were being lifted up some distance.

A. No, it was in the process of being raised, or being lifted, I mean.

Q. I think you said earlier it had just started to be lifted.

A. Yes, it was just started. Actually it was on the way [26] up, but had just started.

Q. That is what I mean. It had just begun to be lifted? A. Yes.

Q. Now another thing that I think we all understand, but perhaps we don't. The releasing gear has no effect on these fingers or these safety guards at all, does it?

A. No, because when it falls back it releases the guard.

Q. Those fingers remain in position all the time?

A. Yes.

Q. And when the releasing gear is operated to release the boat from the davits, what it does is throw this hook—— A. Back.

Q. ——backwards, so that the hook, being on a hinge or something, comes back enough so that the link then automatically can slip right out of the hook? A. Yes.

Q. Is that right? A. That is right.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of LaVern R. Hinrichs.)

Mr. Wood: You understand, don't you, Mr. Denecke?

Mr. Denecke: Yes; I was confused there for a moment.

Mr. Wood: I think that is all.

Recross Examination

Q. (By Mr. Denecke): Now, Mr. Hinrichs, when you saw the hook here at this [27] instant that Flovik called your attention to it was the hook in position? By that I mean was it as it should be with the releasing gear closed?

A. Was it actually, you mean——

Mr. Wood: You mean was it like that, down?

Mr. Denecke: Yes.

A. Yes, it was down.

Q. The hook was in the position as shown on Exhibit 2? A. Yes.

Q. How about the fingers? What was their position?

A. To tell you the truth, I didn't even notice the fingers. But I did see that the ring, instead of being seated in where it should, was just balancing on the point of that.

Mr. Wood: On the point of the hook?

A. On the point of the hook, yes.

Mr. Denecke: That is all.

Redirect Examination

Q. (By Mr. Wood): But the hook was in its normal down position? A. Oh, it had to be.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of LaVern R. Hinrichs.)

Q. As it should be when the releasing gear is locked? A. Yes.

Mr. Wood: That is all.

Mr. Hinrichs, under the Federal Rules you have [28] the right to read and sign your deposition or you may waive that right, if you wish. Are you willing to waive the reading and signing of your deposition?

A. Yes.

(Deposition concluded.) [29]

[Endorsed]: Filed May 20, 1957.

PLAINTIFF'S EXHIBIT No. 4

[Title of District Court and Cause No. 8459.]

Portland, Oregon, April 12, 1957.

9:30 o'clock A.M.

DEPOSITION OF DAVID E. R. PATTERSON

Be It Remembered That, on this 12th day of April 1957, beginning at the hour of 9:30 o'clock A.M., the deposition of David E. R. Patterson, a witness in behalf of the plaintiff herein was taken pursuant to the oral stipulation hereinafter set out, before Wm. Chun, a Notary Public for the State of Oregon, in the Offices of Wood, Matthiessen, Wood and Tatum, 1310 Yeon Building, Portland, Oregon.

Appearances: Mr. Erskine B. Wood, appearing

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

for plaintiff. Mr. Kenneth E. Roberts, appearing for defendant. [1]*

David E. R. Patterson, a witness in behalf of the plaintiff herein, being first duly sworn by the Notary to testify the truth, whole truth and nothing but the truth, was examined and testified as follows:

The Notary: Would you please state your name and address for the record?

The Witness: David E. R. Patterson; the address is 4872 29th Avenue South, Seattle, Washington.

Mr. Wood: This is in the District Court of the United States for the District of Oregon. The title of the case: American Mail Line, Ltd., a Corporation, plaintiff, versus Albina Engine and Machine Works, Inc., a Corporation, defendant; number 8459.

This is the deposition of David E. R. Patterson, taken in the instance of the plaintiff, the testimony de bene esse, to be used at the trial if the witness is not available.

And it is stipulated, is it not, Mr. Roberts, that the deposition may be taken at this time, namely 9:30 A.M., April 12th, at the Offices of Wood, Matthiessen, Wood and Tatum, and before Mr. Chun as Reporter and Notary Public?

Mr. Roberts: So stipulated. We waive any notice.

Mr. Wood: And do you wish that we also stipu-

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

late that all objections are reserved until the time of trial except objections to the form of the question or responsiveness of the answer are waived unless made at this time? [2]

Mr. Roberts: That is the usual stipulation and I will so stipulate.

Mr. Wood: And the record will show that the witness has already been sworn.

Direct Examination

Q. (By Mr. Wood): State your full name, Mr. Patterson? A. David E. R. Patterson.

Q. And where is your home?

A. In Seattle, Washington.

Q. And how old are you?

A. Thirty-two years old.

Q. What is your occupation?

A. I am Chief Mate on the Lahaina Victory.

Q. You go to sea? A. Yes, I do.

Q. How long have you gone to sea?

A. Sixteen years.

Q. Now, do you hold a license issued by the United States Government, through the Coast Guard as an officer?

A. Yes, I have an unlimited Chief Mate's license.

Q. Unlimited Chief Mate's license?

A. Chief Mate's license, yes.

Q. How long have you held that license?

A. About, over four years—a little over four years, [3] approximately.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

Q. And unlimited means it is for any ocean?

A. Any ocean, any tonnage.

Q. Any tonnage? A. Yes.

Q. Prior to holding a chief mate's license, did you hold a license as second mate, third mate?

A. I had a second mate's license for a few years, and then I had a third mate's license for—I have had a license now—I have been a licensed officer over twelve years or going on thirteen years now.

Q. And those licenses were all issued by the United States Government?

A. All by the United States Government, yes.

Q. Now, do you hold any commission in the Navy?

A. Yes, I am a Lieutenant (jg) in the U. S. Naval Reserve.

Q. When were you given that commission?

A. I applied for a commission in 1950. I was commissioned in 1950.

Q. Then have you served a period of active service—duty under the commission?

A. No, not active duty.

Q. Have you made your training cruises?

A. No, I have just been taking correspondence courses, and as to that extent, I have never been actually on a training ship [4] or—(interrupted)

Q. Your entire service has been in the merchant marine?

A. Entire service has been on merchant ships.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. And you hold a reserve commission in the Navy as Lieutenant (jg)? A. Yes.

Q. Now, for what steamship companies have you worked as a mate—as a licensed officer?

A. American Mail Line, Alaska Steamship Company, oh, let's see—Mississippi Steamship Company, Alaska Transportation—that is about all I can think of—Pacific Tank—no, just a minute, not Pacific Tankers. It is hard to tell, I was on a ship that they were agents for. I believe it was—no, I couldn't even remember. It was during the first part of the war so I don't remember.

Q. All right, now, what is your present ship?

A. The Lahaina Victory.

Q. And that is operated by American Mail Line?

A. American—operated by American Mail, yes.

Q. And what is your position on that ship?

A. Chief Officer.

Q. And are you about to depart from here on a voyage?

A. We are leaving Saturday morning at 6:30.

Q. That will be Saturday, April 13th?

A. 13th. [5]

Q. That's tomorrow?

A. That's tomorrow morning.

Q. And where is the vessel bound, so far as you know?

A. As far as I know, it is going to Korea.

Q. And your home is in Seattle, is that right?

A. My home is in Seattle, yes.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

Q. So is it uncertain when—or if—(interrupted)

A. This is not a scheduled ship. There is no—you are signed on for a period of at least nine months, so they could send us anywhere. They could make a fast trip over and back. There is no schedule to this ship. It is just wherever they can grab a cargo.

Q. Yes, were you aboard the SS Java Mail at the time one of the lifeboats fell and a seaman named Nelson (phonetic) sustained injuries on the 7th of April 1955? A. Yes, I was.

Q. And what was your position aboard the vessel? A. I was Third Mate.

Q. Were you present when the lifeboat fell?

A. Yes, I was.

Q. Did you see the accident?

A. I saw the accident, yes.

Q. Now, going back—strike that—about what time did the accident happen?

A. Just after coffee time, around 10:30—after—oh, I would [6] say 10:30.

Q. Now, going back a little before the accident, had any work or tests been conducted on the lifeboat?

A. Yes, there was a weight test made by the Albina Repair.

Q. That was Albina Engine and Machine Works?

A. Albina Engine and Machine Works, that's right.

Q. And did you see that weight test?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

A. Yes, I witnessed the weight test along with the Coast Guard Inspector.

Q. Where were you when you witnessed it?

A. On the boat deck.

Q. You were on the boat deck?

A. That's right.

Q. And where was the boat?

A. The boat was at—it was in the water and it hoisted up clear of the water.

Q. With the weight in it?

A. With the weight in it, that's right.

Q. Now, did—where was the boat taken to have the weight put into the boat?

A. The boat was drifted aft to number 4 hatch.

Q. And who were in the lifeboat when that was done?

A. The Albina Repair and Machine—(interrupted)

Q. Do you know how many men were in the boat? A. I only remember two. [7]

Q. And then where did they load the weight in?

A. The weight was loaded by the ship's gear, number hatch.

Q. Then where was the boat taken?

A. The boat was taken then, under the falls, hooked up.

Q. And who hooked it up?

A. The Albina people there.

Q. Did the men in the boat hook it up?

A. Yes.

Q. The boat was in the water?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

A. The boat was in the water, that's right.

Q. Then was the boat lifted with the weight in it?

A. The boat was lifted with the weight in it.

Q. Did the Albina men remain in the boat while it was lifted? A. Yes.

Q. And then after it was lifted, what was done?

A. The boat was then released, drifted aft to number 4 hatch again.

Q. I suppose first it would have to be lowered into the water?

A. Yes. After it was released, it was dropped down, unhooked and taken back to number 4 hatch.

Q. Now, what do you mean by "released"?

A. Well, for the weight test, the boat had to be hooked up. They had to release the hook, drift the boat aft.

Q. Now, who released the hooks?

A. The Albina Repair Yardmen. [8]

Q. And what hooks are you talking about, when you say they released the hooks?

A. The hooks, or the two—for the two on the falls that were on the lifeboat.

Q. How many are there?

A. One on each end.

Q. On each end of the lifeboat?

A. That's right.

Q. All right, then, after they released the boat by unhooking the boat from the falls, then what did they do with the boat?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. Took it back to number 4 hatch, discharged the weight and then brought the boat back to the davits again, under the falls again.

Q. And who was that done by?

A. Done by Albina.

Q. And then was the boat hooked on to the falls again? A. Yes, sir.

Q. And who did that? A. Albina.

Q. Then, did you continue to stay and watch the proceedings while the boat was raised, or—(interrupted.)

A. No, all I had to do was to witness the test. Actually, I don't have to witness the test. The Coast Guard Inspector witnesses the test. I was with him.

Q. And you were on the boat deck—(interrupted.) [9]

A. Yes—all I could see—I could see—all he wanted to— (interrupted.)

Q. You could see all of the proceedings?

A. All he wanted to do was to see that the davits would hold when the weight test was made.

Q. Well, then, after the weight test was completed, and the boat brought back empty—the boat was brought back empty, wasn't it?

A. That's right.

Q. Then where did you go?

A. I went with the Inspector on some other job. I don't remember what it was, but just around, anyway. As I remember, it was fairly close to 10

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

o'clock at that time, and we had a cup of coffee.

Q. Then they had coffeetime aboard the ship?

A. Coffeetime, yes.

Q. When did you next come back to that lifeboat?

A. After fire and boat drill—I mean after coffeetime.

Q. I have been a little bit loose talking about the lifeboat. What lifeboat is it that we have been talking about throughout here?

A. It is the starboard lifeboat.

Q. The one on the starboard side?

A. That's right.

Q. How many lifeboats are there on the ship?

A. Two lifeboats.

Q. And this is the starboard lifeboat?

A. That's right.

Q. Is that the one that you have been talking about all through your testimony?

A. That is the one.

Q. Then what happened after coffeetime?

A. Well, we had all hands muster for a boat drill.

Q. And where did you muster?

A. Along with everybody else, on the boat deck.

Q. And by which boat?

A. By the starboard boat. At that time, it was the offshore boat.

Q. And did you take part in the fire and boat drill in any way? A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. What was your job?

A. I was in charge of the boat drill.

Q. For that boat? A. For that boat.

Q. Well, then, what was the first thing that you did or had the crew do?

A. Well, first, we rang the alarm, and all hands come up on the boat deck, and then I assigned a couple of men to run out the painter and one man to go in the boat and check the plug.

Q. And then what is a plug? [11]

A. It is a—a plug is a plug for the bottom of the boat. All it is, we use it for draining purposes on board when it is not in the water.

Q. You mean—do I understand it is a plug on the bottom of the boat? A. That's right.

Q. That is taken out to drain any water that is in the boat?

A. Any rain water—any water that happens to get in there on a voyage. The plug is always out of the boat, naturally. The first thing you do is to put the plug back in. I make sure—check to see that the plug is put back in.

Q. So you assigned a man, and told him to check the plug? A. That's right.

Q. Then at the time this fire and boat drill commenced, after coffeetime, was the boat in the gripes? A. Yes.

Q. And what are the gripes?

A. Gripes are two straps that hold the boat in, to keep the boat from swinging.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. Where are they?

A. One on each end of the boat.

Q. And do they go around the boat?

A. They go around the boat, that's right.

Q. And what are they secured to?

A. They are secured to the davit, by a pelican hook. [12]

Q. Now, when the boat is in the davits and in the gripes, what supports the weight of the boat?

A. The falls. They support the weight of the boat.

Q. And what is the purpose of the gripes?

A. The gripes is to keep the boat from—well, if you are in any heavy seas or anything, just to keep the boat frapped in to the davit?

Q. Frapped in?

A. Well, yes, keep it into the davit—keep it from swinging into the davit.

Q. Well, is the—is the weight of the boat—you have already answered that. But do the falls still support the weight of the boat?

A. That's right, the falls are always supporting the weight of the boat.

Q. About how much does a lifeboat weigh, approximately? A. Approximately two ton.

Q. Well, then, at the outset of the fire and boat drill, was anything done about the gripes? Were they released?

A. Yes, the gripes were released.

Q. Who did that?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. I don't remember. A couple of sailors.

Q. You don't remember their names?

A. No, I don't.

Q. A couple of sailors did that? [13]

A. Yes.

Q. Now, then, was the boat lowered?

A. The boat was then lowered.

Q. Were any seamen in the boat as it was lowered?

A. This is the part I am kind of vague on. I sent the men up to put the plug on—to check the plug and with the rest of everything going on, and I had the boat lowered down, and I assume that they were in the boat, although they could have gotten in at the boat deck as soon as it come down even with the boat deck.

Q. In other words, you don't know whether they got into the boat?

A. No, I couldn't—I couldn't remember exactly, whether the boat—whether they rode the boat down from the davits or whether they got in at the—
(interrupted.)

Q. At which level?

A. At the level of the boat deck.

Q. Well, that's what I mean—were they—were there any men in the boat as it was lowered below the level of the—to the level of the boat deck?

A. Yes, there was.

Q. And how many? A. Two.

Q. Who was lowering the boat?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. I believe it was a deck maintenance man.

Q. And how does he do that?

A. Just—excuse me—he just releases a brake.

Q. Where is that, on the boat deck?

A. Yes, on the boat deck.

Q. Near the davits?

A. Yes, it is near the davits. There is a winch right there.

Q. Then as the boat was being lowered, it is hanging in the air, is it supported at each end by the falls? A. That's right.

Q. Then go on and tell what happened after that.

A. Well, the boat was—I had the boat lowered and then as the boat was going down, I walked over to the rail or close to where—when it got down to where I could see the boat, I looked to see that there was no rudder in the boat.

Q. What deck were you on?

A. The boat deck at this time. So I had the boat stopped.

Q. Where was the boat when you had it stopped—at what level, that was?

A. Level with the cabin deck, which is the next deck below the boat deck.

Q. You had the boat stopped and then what did you do?

A. I got one of the seamen, and got the rudder, and went down with him to the cabin deck, because I was going to go down in the boat.

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(Deposition of David E. R. Patterson.)

Q. Did some other seaman come along too? [15]

A. Well, that's what happened. When the boat was stopped, there was one fellow from the Steward's department and also one sailor that got in the boat, assuming that is what they were supposed to do. The procedure is, we had a ladder down to the water, and all hands were to go down the ladder.

Q. That is a Jacob's ladder?

A. A Jacob's ladder. This messboy, assuming that that is when the boat stopped, got into the boat, and also one other seaman.

Q. That is when the boat was stopped at the——
(interrupted.)

A. At the level of the cabin deck.

Q. At the level of the cabin deck?

A. That's right.

Q. That is one deck below—one deck below the boat deck, a couple of these fellows—— (interrupted.)

A. Got in.

Q. ——assumed that they should get in?

A. Assuming—what they were trying to do is to get off from climbing the ladder, that is what—— (interrupted.)

Q. All right, then, how many were in the boat?

A. There were four men in the boat.

Q. And what did you do yourself?

A. Well, I had reached the cabin deck with one sailor, and the rudder, and I was just getting ready to step in the boat—in other words, I was

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

going to get in the boat and have the man [16] pass me the rudder—have the rudder hooked up or ship the rudder so that she would be ready when she was lowered into the water. Just to save time, was all we were trying to do.

Q. And what happened?

A. Just as I was getting ready to step in the boat, the boat fell.

Q. Immediately prior to the boat falling, did you hear one of the seamen say anything?

A. Somebody did say something?

Q. Or remark anything?

A. But it was so—it happened so fast that by the time that I—I had just turned around to step in, in fact, I was backing up—I had ahold of this tiller and I just turned around to step in the boat, and down it went.

Q. That is, you were stepping from the cabin deck level?

A. From the cabin deck level into the boat.

Q. And was the boat about level with the cabin deck? A. Yes. Well, approximately level.

Q. And it was suspended by the falls?

A. Suspended by the falls.

Q. At which end did you start to step in?

A. The after end, where I was to ship the rudder.

Q. And at which end did the boat let go first?

A. From the—from where I was, the way it fell, from the after end—I mean, you see, everything

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happened so fast, that [17] it—I assume it would be the after end when she let go.

Q. You mean the boat let go at the after end?

A. Yes.

Q. Before it fell from the forward end?

A. Yes.

Q. What happened when the boat let go from the after end?

A. Well, the boat went down, indicating that the weight was then all taken by the other davit—the other davit and falls and—— (interrupted.)

Q. That would be the forward one?

A. And it broke the falls—it took the davit—swept the davit off the boat deck.

Q. And how many men were in the boat when it fell?

A. There were four men in the boat.

Q. Do you remember who they were?

A. There was Gordon Nelson; there was this messboy by the name of Chan, and there was Flovik (phonetic), and Hinricks.

Q. I am not sure now whether—I don't remember exactly what you testified, as to whether somebody had said something immediately——(interrupted.)

A. Somebody did say something, but it was before—I mean, it just happened—it happened so fast that whatever—I didn't see anything. He said something about—I couldn't remember anyway, I know.

Plaintiff's Exhibit No. 4—(Continued)
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Q. Do you remember at all what he said? I mean, did he say [18] something about the weather, or what a nice time he had the night before?

A. No, no, he did say something about the hook or the boat or to grab ahold of a line or something. It was unusual for whatever he said—and it was either to grab a man rope or something he said to another seaman. He wasn't talking to me, but I was right there, naturally, I could hear. I don't remember exactly.

Q. That was just a split second?

A. Just—it happened so fast—just maybe a second. As I said, before—— (interrupted.)

Q. Before what? A. Before the boat fell.

Q. Now, before you started this lowering of the boat and when the fire and boat drill first began, and you were on the boat deck, did you make any inspection of the link in the hook by which the boat is supported to the falls?

A. No, I did not. I did not inspect it.

Q. Is it customary for the Mate in charge of the lifeboat to inspect the attachment of the link to the hook?

A. It is not customary to inspect.

Q. What do you rely upon?

A. This is a patented device. There could not be anything wrong with these hooks or with anything, if you got the weight on the falls, there is nothing that can happen. [19]

Q. Now, you have talked about this hook and

Plaintiff's Exhibit No. 4—(Continued)

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the gripes, can you explain it in a little more detail? Now, where is the hook attached?

A. The link, you mean, on the fall—the link is on the fall.

Q. The link, and what is the link?

A. Just a swivel hook or a swivel link that is made fast to the — (interrupted)

Q. There is a difference between a hook and a link or link? A. Yes.

Q. A ring or link goes all the way around, doesn't it? A. Yes.

Q. A hook has— (interrupted)

A. This is not a hook; this is a ring.

Q. All right, it is a ring?

A. There is no opening in it. It is a complete circle.

Q. And what is that attached to?

A. To the block on the fall.

Q. Is that the last connecting member on the fall itself? A. Yes, it is.

Q. Is that oval or circular?

A. It could be anything. It could be elongated. It could be oval. It could be circular, depending on the different manufacturers.

Q. All right, now, what does this link or ring or swivel attach on to on the lifeboat? [20]

A. It attaches to a hook.

Q. On the— (interrupted)

A. On the boat.

Q. And how does that hook operate?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

A. The hook is—it is just a regular hook that flops up and down and is locked by a locking device.

Q. And what is the releasing gear?

A. The releasing—I mean, that is a releasing gear—I mean, that is—it is a lever thrown to release this hook from that ring.

Q. And is that releasing gear—where is that located? That is a lever?

A. Usually in the middle of the boat.

Q. Toward the bottom?

A. Bottom, yes, sir; on the bottom, off to one side, but anyway—— (interrupted)

Q. Now, when the releasing gear or locking device is in the closed position, then what is the position of the hook?

A. Would you repeat that, please?

Q. When the releasing gear or the locking device is in the closed position—— (interrupted)

A. Yes.

Q. ——then what is the position of the hook?

A. The hook is, the ring is hooked in on the hook, from the falls is—is on this hook—hooked into this hook. [21]

Q. Well, when it is in the locked or closed position, can the hook hinge and flop back?

A. No; no. When it is locked, there is no way for that flopping at all.

Q. Now, when the releasing gear is released so that it opens, then how does that affect the hook?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. Well, when you release—when the releasing gear is thrown, the hook can flop or has to flop up and the hook falls off—the hook falls out—or the ring falls out, let me put it that way.

Q. Now, when the releasing gear is locked, and the hook is in the closed position, what is there to keep the ring from coming out of the hook?

A. There is a couple of fingers made fast to the hook on the boat.

Q. Now, do those fingers move when the releasing gear is operated? A. No.

Q. They are stationary?

A. They are stationary.

Q. Well, when the hook is—what is the purpose of those fingers?

A. The purpose of the fingers is when you are hooking your boat up, assuming now, that you are down on the boat by yourself, or you would hook up one end of the boat, the fall—put the fall [22] in on the hook, throw the releasing bar over and lock the hook on the ring. The keepers will then keep the hook, while you are doing this—will keep the hook from coming out.

Q. Do the keepers come sufficiently close to the end of the hook so that the space, so that, when it is closed—— (interrupted)

A. Yes, that's the idea.

Q. ——the keeper will keep the ring from slipping off the hook? A. Yes, that's right.

Q. Well, if the hook and the keepers are in good

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

condition, the way they are designed to be, is it possible—and when the hook is closed and locked, is it possible for that ring to slip out?

A. No, that is the idea of the keepers. If they are in—if the keepers are in good order, the ring cannot come out.

Q. Now, after the accident happened—— (interrupted) A. Yes.

Q. ——did you check the lifeboat or inspect it to find out whether the releasing gear had released, or whether it was still locked?

A. I inspected the boat and the releasing gear was locked.

Q. Where did you inspect it?

A. I inspected the boat in the water.

Q. Right after the accident? [23]

A. Yes. Well, whenever — after everything was—— (interrupted)

Q. After the injured man—— (interrupted)

A. After the injured men were taken care of. I went and got an ambulance, and like that.

Q. Then, at a later time, did you inspect the hook and the swivel and the keeper?

A. Yes, I did.

Q. And what did you find?

A. I noticed that the keepers were not long enough. There was enough space for that hook to come out.

Q. All right, when did you discover this?

A. When I inspected the boat.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. How long after the accident?

A. Oh, say an hour.

Q. Do you know whether the keepers were repaired or whether that condition was remedied later?

A. The condition was remedied, yes, sir.

Q. And what was done to remedy it?

A. Longer keepers were put on.

Q. They put on longer keepers?

A. That's right.

Q. Well, with your having found the releasing gear or locking device was closed and locked, how do you account for the accident? [24]

A. I—— (interrupted)

Mr. Roberts: That is, if he knows.

A. I account for the accident when—in this way, where the boat was hooked up, the men in the boat, when they hooked the boat up, had the hook—had the ring riding on the lip of the hook.

Q. And then what happened?

A. Well—— (interrupted)

Q. What happened to let the boat fall?

A. The hook slipped off, maybe from the men in the boat—the boat would naturally be swinging a little bit or moving, and she slipped off that hook.

Mr. Roberts: Just for the record, I am objecting to any opinion expressed by this witness on the ground and for the reason that it is completely speculative, and he has absolutely no facts on which to base the opinion.

Plaintiff's Exhibit No. 4—(Continued)
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Q. Could that have happened if the keepers had been long enough? A. I don't believe so.

Q. To close that space?

A. I don't believe so.

Mr. Wood: You may cross examine.

Cross Examination

Q. (By Mr. Roberts): Mr. Patterson, have you given any testimony today which [25] would in any way be different from the testimony you gave immediately after the accident on the Java Mail, when you were questioned by Mr. Guysick (phonetic), representing Albina Engine and by Mr. Frederickson, representing American Mail Line, do you think your testimony is substantially the same?

A. I would say so.

Q. Now, before we go any further, whose regular lifeboat was it, was it yours?

A. No, sir, it was the Second Mate's.

Q. You didn't know too much about its condition, did you?

A. Well, I don't—let's put it this way, I had been also Second Mate on that ship.

Q. Yes, but you—— (interrupted)

A. In other words, I have had both. It just happened at that time that I was Third Mate.

Q. So you would be on the port lifeboat?

A. I was on the port lifeboat at that time. That was my station.

Q. When had you been Second—when had you

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

been Second Mate on that ship before this accident?

A. I would have to check, but I had been there a year or so, I had been Second Mate. A year or so.

Q. Now, let's go back a little. When you—you had actually seen the Albina men in the boat, or at least you think you—you think they were Albina men, do you actually know they were? [26]

A. They were not crew members.

Q. They were not crew members?

A. Let's put it that way. That is all I can say.

Q. They could have been some sub-contractor or somebody—you don't actually know what men they were?

A. Well, of course, it is not up to me. I don't know anything about contracts or sub-contracts, but I know Albina always is the—when I see Bailey around, I know that he is—they usually have the contract.

Q. Well, Mr. Patterson, you actually saw the entire operation of the weight testing, is that correct?

A. I saw the boat—yes, I saw the weight testing, that's right.

Q. Did you see the boat when it was first put into the water? And unhooked and then drifted back to number 4?

A. Did I—— (interrupted)

Q. Did you see that?

A. Let's put it this way: I was around when it happened. I saw it, but I mean, I didn't spe-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

cifically sit there and stand and watch them, you know what I mean. I could see what was going on, but I mean, I didn't care—I have been around boats—— (interrupted)

Q. Well, what I was trying—— (interrupted)

A. I have been around, you know.

Q. You actually then, saw the actual boat lifted in the falls and by the davits? [27]

A. That's right.

Q. After the sand or whatever weight had been put into it, is that correct?

A. That is correct.

Q. And then you actually saw it lowered again to the water and unhooked and then go back to number 4 and the weight taken out, is that it?

A. Yes.

Q. And did you actually see it come forward again, be hooked up again?

A. Yes, I saw the boat—well, I mean, just like I say, I saw the boat coming back, or you know, when they were going about their job there, I was around, so I mean, I—— (interrupted)

Q. During this procedure then, it is your testimony that the men in the boat, in doing the unhooking were not sailors, is that correct?

A. They were not ship's personnel, let's put it that way.

Q. All right, did you see the boat being brought up again after the test?

A. No. I mean, not entirely. As the boat was

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

coming up, the Chief Mate ordered me to get some sailors. He was around too, as a matter of fact.

Q. What was that for?

A. Well, when the boat got up, we were going to have the gripes made fast. [28]

Q. Secured for sea?

A. Assuming—yes, that's right, assuming—the gripes, securing the gripes, getting ready for sea.

Q. And the Chief Mate was already there, is that correct?

A. He told me to get some sailors and as the boat was coming up, I left.

Q. Was this boat secured in the gripes inboard?

A. Yes, it doesn't— (interrupted)

Q. It doesn't hang from the davits outboard?

A. No; no.

Q. When you get it up to the boat deck, you have to swing the davits in, and then it rests inboard, is that it?

A. Well, you see, the davits—all it is is two arms, the arms are there, and all the davit does is, it goes up on these rollers and it goes inside of the boat deck.

Q. I see. And did you actually see that it was secured?

A. No, I did not actually see that.

Q. Who did that?

A. Did I actually see somebody secure that boat?

Q. Yes. A. No, I did not.

Plaintiff's Exhibit No. 4—(Continued)
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Q. You did not? A. I did not see it.

Q. Was that done by the Chief Officer and the four sailors? [29]

A. Well, you don't—I don't say the Chief Officer—just whoever was told to go ahead and do it had done it, that's all.

Q. Did you actually get these four sailors and assign them to—— (interrupted)

A. The first two or three I ran across, I sent them up immediately on the job up there.

Q. You, yourself didn't go up there?

A. No.

Q. What did you do?

A. I was with the Inspector. I just went with him, you know.

Q. You had some coffee about that time?

A. Yes, that's right.

Q. You had—you never had anything to do with the actual securing of the boat afterwards?

A. No, no, the boat, as far as securing the boat, the boat is secured in the falls, and that is good enough for me, you know.

Q. And you assumed that the work of putting the gripes on and so forth had been done by the sailors? A. That's always—yes.

Q. What was the next thing that happened regarding that particular boat?

A. What was the next thing?

Q. Yes.

A. Well, we had a boat drill.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. Did you have a fire drill first? [30]

A. Yes—well, yes, a fire drill. It was—you see, the way it was on this, was more or less of—we call it a kind of token deal, because of the stevedores working around. Nobody turned the hoses on, and we went through—— (interrupted)

Q. Went through a kind of a—— (interrupted)

A. Went through a kind of a mock fire drill—just a matter of a few minutes, you know.

Q. And then what did you do?

A. Then we had a boat drill.

Q. Then did the whistle sound?

A. Well, at this time, I believe they just rang the bell. I don't believe they blow the whistle in port.

Q. And the boat you used was—— (interrupted)

A. Our outboard boat.

Q. Did all the crew get up there?

A. They all came up on the boat deck.

Q. They all came up on the boat deck. When you got up there, was the boat secured?

A. Yes, it was.

Q. Was it in its gripes?

A. It was griped in, that's right. It looked—— (interrupted)

Q. It looked as though it was completely griped in its position for sea, is that it?

A. (Affirmative nod.) Any time it is inside, swung up inside, it is ready. [31]

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

Q. Now, did you assign anyone to check the falls or the hooking? A. No.

Q. Why didn't you do that?

A. It is just not customary to be done, that is all, on this type of a—— (interrupted)

Q. Why not?

A. Well, to begin with, these hooks—this patent deal—this patent lock, it is impossible for anything to go wrong with it. It is hooked up, and that is all there is—that is, if that boat could come out, all you would ever have to do is to—it would hang, it would hang—if that boat would come unhooked in the davits with no gripes on it, it would go right down, I mean, the weight of that boat would just fall, that's all, the falls are holding the boat.

Q. Mr. Patterson, the crew that you had sent up there to secure the boat, would they handle the hooks in any way on securing—— (interrupted)

A. No.

Q. Why not?

A. They wouldn't handle anything, because everything is hooked up there. There is nothing to handle.

Q. Well, how do you swing the boat inboard to secure it?

A. The boat is never—you see, when I talked about it being griped in, the boat is already there. All these gripes are is [32] just what I told you—— (interrupted)

Q. Well, you are coming up on the side of the

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

ship, aren't you? How are you going to swing it over into the boat deck—the surface of the boat deck?

A. It is riding on rollers, and it just rides right up on these rollers all the way to the top.

Q. Oh, I see. I get it. In other words—— (interrupted)

A. In other words, there is no swinging—it is hanging on the falls and rides all the way up to the top.

Q. On the rollers, is that right?

A. That's right.

Q. And it is griped in, is that it then?

A. Well, as soon as it stops, all you have to do is to hook the gripes on. In other words, there is no swing or anything, it is just as she goes up, she is—— (interrupted)

Mr. Wood: What?

A. In other words, what I am trying to get at is he was trying to get we swing the boat in. The boat does it automatically, that's what I say.

Mr. Wood: You sometimes sort of drop your voice at the end of the sentence. I don't know if the Reporter is getting all of this.

Q. When you got up there for the boat drill, you gave the orders to let the boat go, is that correct? A. That's right. [33]

Q. And that was done by one of the ship's maintenance men, is that correct?

A. That's right.

Plaintiff's Exhibit No. 4—(Continued)
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Q. And you had two sailors in there, one apparently to check the plug, to see that it was in?

A. That's right.

Q. I see. And then, as she started going down and over the rollers, over the side of the ship, you saw that the rudder wasn't in there, is that it?

A. No, when the boat was—when the boat got down below the level of the boat deck.

Q. Yes.

A. You can't see it. It is impossible to see it from where you were, where you were standing, because, the boat was, as the boat goes by you—
(interrupted)

Q. So there wasn't any rudder in it, so you asked the fellow that was operating the lowering to stop, is that it? A. Yes, that's right.

Q. So he stopped at the cabin deck level?

A. That's right.

Q. Where was the rudder, by the way?

A. Well, the gear was entirely out of the boat. There was no provisions or anything in the boat for the annual inspection, it was to be inspected by the annual—by the inspectors. That was the reason for everything being out. [34]

Q. Did the boat stop right at the cabin deck level? A. Yes.

Q. Did it hit against the side of the ship or catch any coaming or anything like that?

A. No.

Q. You are certain about that?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. Well, not to my knowledge, I didn't see it hit.

Q. Then you went down and you were just about ready to climb on board?

A. I was just stepping into the boat.

Q. And you said before that happened, two of the ship's crew had already gotten into the boat?

A. Yes, that's right.

Q. Rather than going down the Jacob's ladder, is that right? A. That's right.

Q. Were you going to lift the thing from the water with a full crew—from the water there, in the boat? A. No.

Q. Why did they have to go down the Jacob's ladder?

A. You mean, why did the crew go down the Jacob's ladder?

Q. Yes.

A. Well, that is just the way it is, there is just too many. When you put—you know when you got the guys, it is much easier to go down the ladder and get in that way.

Q. And you were going to get the full complement for the boat [35] once it was in the water?

A. Once it was in the water, that's right.

Q. And then, after you had gone through that, then the men would have left the boat again by the Jacob's ladder rather than being hoisted up with the boat? A. That's right.

Q. Now, at any time prior to the accident, had

Plaintiff's Exhibit No. 4—(Continued)

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anyone given you any information regarding the hooking set-up on the boat? A. No; no.

Q. Had you ever received any complaints about it? A. No, I had received no complaints.

Q. Do you know if any other crew members or any officer on the boat had?

A. Not to my knowledge.

Q. You didn't assign anyone to check the falls or anything? A. I did not.

Q. Were the two men in the boat originally a man called Nelson and Hinricks?

A. Were they originally in the boat?

Q. Yes.

A. Yes, they were the two men that were assigned, in that one boat.

Q. Now, when you did stop the boat, as it was going down, in order to put the rudder in it, did you have to rehoist the boat in any way or did it stop at that level? [36]

A. Well, I didn't give any orders to that, I mean, I was going down anyway, in the boat—I was going to ride the boat down when it got even with the boat deck, but—I mean, when it got down and with the two men in the boat. When I saw that there was no rudder, why then I stopped, and—— (interrupted)

Q. And do you know whether the boat had been hoisted after you had stopped it in any way so as to be more—at a more convenient level to get into?

A. Yes, yes, it could have been put—I mean, it

Plaintiff's Exhibit No. 4—(Continued)

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would have been from up there. I didn't give any orders to that effect.

Q. But you don't know about that?

A. No, I could not say for sure. I mean, I don't remember it right now, let's put it that way.

Q. I believe you previously testified that when you saw the other steward get in the boat, just the—nobody in the boat, just the two men riding down, is that about right? A. That's right.

Q. And the two guys had already got in there?

A. This Chinese fellow got in the boat, and was—it was while I was getting the rudder. I mean, I was not there.

Q. And you say it was the after end of the—
(interrupted)

A. The after fall; the after fall.

Q. Was there a Coast Guard hearing on this casualty, Mr. Patterson?

A. Yes, there was. [37]

Q. Did you testify on this casualty at the Coast Guard hearing? A. Yes.

Q. Did you give substantially the same testimony that you have given today to Mr. Wood?

A. Yes.

Q. Do you know exactly what instructions had been given to the ship repair people as far as testing the boat—do you know anything about that?

A. I did not read the specs, I mean.

Q. No, I see. You inspected the hooking device

Plaintiff's Exhibit No. 4—(Continued)

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afterwards, was there any actual fracture of any of the component parts?

A. No, the hook was in perfect shape. The ring was in perfect shape, and the block. There was no broken parts.

Q. Was there anyone in the boat that you know of after the weight test and after it had been hoisted up again and secured?

A. Did anybody ride the boat up, you say?

Q. Yes. A. Not to my knowledge.

Q. How high would that lift be, do you remember? What would you say, it would be, from the water to the boat deck?

A. From the level of the boat deck or up to where it was secured?

Q. Up to where it is secured?

A. I would have to estimate, but I would say forty feet.

Q. And during that period of lift, the full [38] weight of the boat would be on the falls and the hooking device, is that correct?

A. That's right.

Q. Is there any movement of the falls or of the hooking devices as you swing the boat in to secure it, that you know of? A. (Negative nod.)

Mr. Wood: The witness is giving a negative shaking of his head. You had better say no.

A. No.

Q. Was there any undue strain on the hooking

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

devices or anything, or the falls as you swing her inboard?

A. No. If I might explain again, there is no strain, you see. They are hanging on the falls, and all it is, she stays in the same position all the time. All it is is a big arm that works up all the way back up, and so there is no swing or anything like that. She just rides up.

Q. Except your falls gets narrower—shorter and shorter as they get close to the block?

A. Oh, yes, I mean, that's— (interrupted)

Q. When the boat is actually secured, is there much rope between the block and to where it is attached?

A. Rope? This is wire.

Q. Oh, wire—this is wire?

A. Yes. Is there much wire between?

Q. Is there much wire between? Yes. [39]

Mr. Wood: You mean how far apart are the two blocks?

Q. Yes, the two blocks—yes.

A. I would say a foot or two feet, or something like that.

Q. You mentioned the painter, now, will you explain that to me—see if I understand what you mean by a painter?

A. A painter is a line in the forward end of your boat, led forward and secured on the forward part of your vessel to keep the boat from drifting away when the boat is lowered and released from the falls.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

Q. By the way, where is the surplus wire stored or kept? A. On the drum.

Q. On the drum?

A. Always kept on the drum.

Q. As I understand it, the hooking device was repaired, or at least something done to it after this accident? A. Yes.

Q. And what was that?

A. I couldn't tell you.

Q. You said something about the fingers were lengthened?

A. The fingers were lengthened, that's right, but I mean, I didn't—I didn't order any work done, that is not my job.

Q. Who was the man who was operating the mechanism for lowering the boat, was that a Mr. Bill Neeves (phonetic)?

A. Bill Neeves, that's right.

Q. What time had elapsed, would you say, Mr. Patterson, from [40] the time after you had seen the weight test and had gone away and gotten the men to help secure the boat, from the time you got back up to the boat deck for the boat drill?

A. Oh, half an hour, forty minutes. I will just have to go guess at that.

Q. Just one thing I want to ask—on the star-board side of the shell of the vessel, is there any attachments of any kind that protrude out beyond the side of the vessel, like the housing for the star-board gangway or anything?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. Yes, there is.

Q. Do you know whether the boat actually got caught up in any of these attachments on the side of the vessel?

A. I know the boat did not get hooked up in any of that. I know that for a fact.

Q. You say there was no catching or anything, the movement from the time—— (interrupted)

A. No.

Q. From the time that the boat left the boat deck?

A. The requirements for a boat of this type to be lowered, the vessel has to be listed over fifteen degrees—I mean, it still has to be working at a fifteen-degree list the opposite way.

Q. I don't quite understand that, Mr. Patterson.

A. In other words, say your ship was taking water, and she was listed over like this (indicating), laying over like that on the side. [41]

Q. Fifteen degrees?

A. That boat should still be able to go down, clear everything and go in the water.

Q. I see, you mean—— (interrupted)

Mr. Wood: You mean if she is listing fifteen degrees to port—— (interrupted)

A. To port, that's right, in other words, so the boat would not swing in and—— (interrupted)

Mr. Wood: And scrape against the side of the boat?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

A. And scrape alongside the boat. I believe that is in the Coast Guard requirements.

Q. Is it your testimony that there was no catching on there in the lowering of the boat at this time? A. No.

Mr. Roberts: I think that is all, Mr. Patterson.

Redirect Examination

Q. (By Mr. Wood): I have a couple of questions to clear up and you will be through in two or three minutes. You understand that it is a Coast Guard requirement that you can lower the boat without it scraping the side of the ship with a fifteen-degree opposite list?

A. That is the law—there is a law that the boat has to be able to be lowered to the water with a fifteen-degree list. [42]

Q. And in order that that can be accomplished, does that mean that the davits, when they are in the position for lowering the boat—— (interrupted)

A. Have to be far enough—— (interrupted)

Q. ——have to be far enough out—— (interrupted)

A. ——have to be far enough out—— (interrupted)

Q. ——so that the boat clears?

A. ——so that the boat won't lay alongside the ship.

Q. On this occasion, was there a fifteen-degree list?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

A. Oh, Christ, no. It couldn't be. You never have any more than a one or two degree list unless it was—— (interrupted)

Q. Was there any noticeable list?

A. There was no list at all.

Q. Now, you said — Mr. Roberts asked you a question about when you looked at this hook and swivel link, after the accident, whether anything was broken, and you said it was in perfect condition?

A. Well, let me put it this way: As far as, he asked me about the hook—— (interrupted)

Mr. Roberts: Whether it was fractured or anything or any of the locking device?

A. No, the hook was all right.

Q. The hook itself was in perfect condition?

A. In perfect condition, I mean, from my observation as far as—— (interrupted) [43]

Q. Were the keepers—— (interrupted)

A. The keepers were not long enough, I could see that, but I mean, he asked me if there was any fractured or broken parts.

Mr. Roberts: That's right, and there wasn't any. Go ahead, Mr. Wood.

Mr. Wood: That is all. I just wanted to show that that perfect condition didn't mean that it was perfect.

A. I see that, but what I was trying to get at, you asked me whether there was anything broken as far as the hook was concerned.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of David E. R. Patterson.)

Mr. Roberts: The hook, or any of the locking device, actually.

Recross Examination

Q. (By Mr. Roberts): Let me put it this way, Mr. Patterson: That the locking device or whatever you want to call it, that is the entire part, the hook and the fingers and everything else, could have been used again to hook up on the lifeboat, couldn't they? A. Yes.

Q. They were in the same condition then, as before the accident as after the accident, isn't that right? A. Yes, and—— (interrupted)

Q. Except they were unhooked?

A. That's right.

Q. That's all I want to know. [44]

Mr. Wood: That's all. Now, Mr. Patterson, under the Federal rules and the rules of court, you would have the privilege of reading this deposition over and then signing it, or you have the privilege of waiving.

A. I would waive; I want to waive.

Mr. Roberts: I want one more question, Mr. Wood. This is on perpetuation. Are you on this grain run to the east right now, Mr. Patterson?

The Witness: Yes, I am.

Mr. Roberts: And of course, you are under charter, aren't you—bareboat charter?

The Witness: Bareboat charter, that's right.

Mr. Roberts: Is this a Maritime ship?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

The Witness: It is a Maritime ship.

Mr. Roberts: How do you spell the name?

The Witness: Lahaina?

Mr. Roberts: Yes.

The Witness: L-a—I just went on that ship. The fact is, that is what the deal is. I just got on—I haven't been aboard her only about an hour or so.

Mr. Roberts: I see.

The Witness: I can't spell a Kanaka name. Lahaina, anyway.

Mr. Wood: It is a Hawaiian name. You can look it up. It is a Hawaiian name. [45]

Mr. Roberts: A Victory. And where are you going from Portland?

The Witness: To some port in Korea, which one—— (interrupted)

Mr. Roberts: Are you loading wheat here on the Columbia River?

The Witness: Yes, at Longview.

Mr. Roberts: Longview, and where is she berthed right now?

The Witness: She is berthed at Longview at the Wheat Elevator.

Mr. Roberts: And you are going directly from the Columbia River to the Far East?

The Witness: To the Far East, yes.

Mr. Roberts: Do you know when you are likely to be back?

The Witness: I can only assume that, if every-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of David E. R. Patterson.)

thing went right—I mean, assuming that there was no cargo was coming back, and we went over and discharged, and come back, I would say thirty-five days, but I mean, that would be assuming we got good weather and nothing happened, but if we load, I mean, go some place else, I mean, with this cargo we got here, if we went over and come back without any, I would say a month or a month and half, forty-five days.

Mr. Roberts: You usually come back in ballast?

The Witness: That's right. [46]

Mr. Roberts: Do you know where—where is the crew signed on, do you know, here in Portland?

The Witness: They are signed on—they signed on at Longview. They are already signed on, although I am not signed on yet.

Mr. Roberts: And you don't know where you will come back to?

The Witness: No.

Mr. Roberts: Just presumably some port in the Pacific Coast?

The Witness: Presumably, yes.

Mr. Roberts: Okay. Thank you.

Mr. Wood: That is all.

(Witness excused and signature waived.)

Concluded: 10:30 o'clock a.m.

[Endorsed]: Filed April 26, 1957.

PLAINTIFF'S EXHIBIT No. 5

Having been placed under oath, I state that my name is Peter P. Flovik, 226 - 3rd Ave. No., Seattle 9, Wash. Z 25887, 53 yrs. of age—married. Been going to sea for 25 yrs. S.O. this Java Mail in Jan. as A.B. Pd. off yesterday and am now on port pay roll. Up at 0530 to shift from Crown Mill to Term. 4—breakfast, then called at 0830—worked about deck until coffee time (1000). Then fire drill—boat drill followed—I'm in #2 boat crew—3rd Mate picked 2 men to go in #1 boat on boat deck. Nelson and Hinrich lowered boat to main deck a little below—then stopped it. As rule they have men go in at that point. I went in first—Chan followed me. Then they said no more in boat. I don't know who hollered but am almost certain it was 3rd. I don't know why they did not let more men in it. I was holding man rope. Had life jacket on. I was at 1st thwart forward of stern. Noticed link between block and pelican hook was not in place.

[Diagram showing what I observed.]

Think I was the first to see it. I told Hinrich. I told him to grab man rope. I hollered to 3rd Mate too. I said look at link. I don't think boat was moving then. Anyway, in 15 or 20 seconds, she let go at the aft fall. It let go aft—I know that. I did not check releasing gear. I know of no one attached to ship that checked it. I do know that shipyard people were working with boat. I did not see them lower and raise it, but did see them in it at #4 hatch. Bos'n told me to help gripe it in, which

Plaintiff's Exhibit No. 5—(Continued)

I did. I did not look at hook then. I did not get hurt. Chan and Nelson are still in hospital.

This statement consisting of 2 pages is true and correct and given at Portland, Ore. on 7 April, 1955. A copy has been given me.

/s/ PETER P. FLOVIK.

PLAINTIFF'S EXHIBIT No. 7

FULL RELEASE

Know All Men by These Presents, That I, the undersigned, Benjamin E. Nelson, formerly a seaman on the SS Java Mail, in consideration of the payment to me of the sum of Thirty-five Thousand Dollars (\$35,000.00), by or on behalf of American Mail Line, Ltd., receipt whereof I do hereby acknowledge, Have Released and by these presents Do Hereby Release said American Mail Line, Ltd., its underwriters, the steamship Java Mail, her owners, charterers, agents, and officers, from any and all claims and liabilities, including, but without limitation, claims and liabilities for damages, compensation, maintenance and cure, transportation, wages to the end of the voyage, and any and all claims of whatsoever nature and kind, whether enumerated herein or not, growing out of or in any way connected with my service as a seaman on the SS Java Mail, and particularly the accident occurring on or about April 7th, 1955, when one of the lifeboats, in which I was, fell, resulting in

Plaintiff's Exhibit No. 7—(Continued)

the severing and subsequent amputation of my left leg and other serious injuries to my body.

This Release is in full and complete satisfaction for all of said injuries received from said accident, whether the consequences be now fully known to me or hereafter develop or be discovered. No promises of employment have been held out to me to get me to sign this Release, the sole consideration therefor being the payment of the aforesaid sum of \$35,000.00.

I have read this Release and had it explained to me by my attorney, and fully understand it.

Further, in consideration of said payment to me of said \$35,000.00, I hereby agree to dismiss as to American Mail Line, Ltd., with prejudice and without costs, the cause of action which I brought in the Circuit Court of the State of Oregon for the County of Multnomah on account of said injuries, entitled "Benjamin E. Nelson, Plaintiff, vs. American Mail Line, Ltd., a corporation, and Albina Engine & Machine Works, Inc., a corporation, Defendants, No. 225772".

In Witness Whereof, I have hereunto set my hand and seal to this and four other Identical Releases this 5th day of December, 1955.

[Seal] /s/ BENJAMIN E. NELSON.

Approved:

/s/ RICHARD R. CARNY,

Attorney for Benjamin E. Nelson.

Plaintiff's Exhibit No. 7—(Continued)

State of Oregon

County of Multnomah—ss.

On this 5th day of December, 1955, personally came before me, the undersigned Notary Public, the within named Benjamin E. Nelson, who declared to me that he executed the foregoing freely and voluntarily and understandingly for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

[Seal] /s/ MABEL DOANE,
Notary Public for Oregon. My commission expires
June 5, 1958.

PLAINTIFF'S EXHIBIT No. 8

FULL RELEASE OF ALL CLAIMS

Know All Men by These Presents that I, the undersigned, Chan Ting Yee, for and in consideration of the sum of Six Thousand Seven Hundred Fifty Dollars (\$6,750.00) to me paid, and receipt whereof I hereby acknowledge, and maintenance which I have received, Have Released, and by these presents Do Now Hereby Release American Mail Line, Ltd., the Steamship Java Mail, her owners, operators, agents, charterers, underwriters and officers, from any and all claims and liabilities for damages, compensation, maintenance, and all claims whatsoever growing out of or in any way connected with a injury which I received when I fell, with a lifeboat, from said vessel into the Willamette

Plaintiff's Exhibit No. 8—(Continued)

River at Portland, Oregon on or about April 7, 1955.

This Release is in full and complete settlement for all of said injuries, whether the consequences thereof be now fully known to me or later develop or be discovered. I fully understand this Release and sign it with the approval of my attorney, and I agree to dismiss with prejudice the action against American Mail Line, Ltd. now pending in the Circuit Court of the State of Oregon for the County of Multnomah in the case entitled Chan Ting Yee vs. American Mail Line, Ltd., et al., No. 225-773.

In Witness Whereof, I hereunto set my hand to this and three other identical instruments this 3rd day of July, 1956.

/s/ CHAN TING YEE.

/s/ MABEL DOANE,

Witness.

State of Oregon

County of Multnomah—ss.

Be It Remembered, that on this 3rd day of July, 1956, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Chan Ting Yee who is known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my

hand and official seal the day and year last above written.

[Seal] /s/ MABEL DOANE,
Notary Public for Oregon. My commission expires
June 5, 1958.

DEFENDANT'S EXHIBIT No. 10

[Title of District Court and Cause No. 8459.]

ANSWERS TO INTERROGATORIES PRO-
POUNDED BY DEFENDANT TO PLAIN-
TIF

1. For answer to the first interrogatory plaintiff says that it does not know. The installation, whenever it was, was before plaintiff's ownership of the vessel.

2. For answer to Interrogatory (2), the answer is No.

3. For answer to Interrogatory (3), plaintiff says that no repairs were made to the connecting swivel link before the boat fell. Afterwards both of the connecting links at each end of the boat were removed and new ones installed by defendant, Albina Engine & Machine Works, Inc.

4. For answer to Interrogatory (4), see above.

5. For answer to Interrogatory (5), plaintiff says that it does not know. Such installations were made before plaintiff owned the ship.

6. For answer to Interrogatory (6), plaintiff says No.

Defendant's Exhibit No. 10—(Continued)

7. For answer to Interrogatory (7), plaintiff says Yes. When, after the accident, defendant Albina Engine & Machine Works, Inc. installed a new link as stated above, they bent or altered the finger guards to suit the new links.

8. For answer to Interrogatory (8), see above.

9. For answer to Interrogatory (9), plaintiff says that it was not known until investigation was made after the accident that the connecting swivel link would disconnect from the hook without the release of the releasing gear.

10. For answer to Interrogatory (10), plaintiff says Yes, under conditions where the boat is resting in choppy water and the falls are extremely slack.

11. For answer to Interrogatory (11), plaintiff cannot speak for every member of a crew of approximately 50, but insofar as it knows, plaintiff says that nobody knew that the link would disconnect from the hook without the release.

12. For answer to Interrogatory (12), plaintiff says No.

Dated January 14th, 1957.

.....
Attorneys for Plaintiff.

State of Oregon

County of Multnomah—ss.

I, C. R. Toole, being first duly sworn, state that I am Superintending Engineer of plaintiff, and that

Defendant's Exhibit No. 10—(Continued)
the above answers to the Interrogatories are true
as I verily believe.

/s/ C. R. TOOLE.

Subscribed and sworn to before me this 14th day
of January, 1957.

[Seal] /s/ FRANCES B. GEORGE,
Notary Public for Oregon. My commission expires
September 10, 1960.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 25, 1957.

DEFENDANT'S EXHIBIT No. 11

[Title of District Court and Cause No. 8459.]

DEPOSITION OF CLYDE R. TOOLE

Taken as an Adverse Party Witness in Behalf
of Plaintiff.

Be It Remembered That, pursuant to stipulation
of counsel for the respective parties, hereto an-
nexed, the deposition of Clyde R. Toole was taken
before Gordon R. Griffiths, a Notary Public for
Oregon, on Monday, the 14th day of May, 1956, at
the law offices of Wood, Matthiessen, Wood & Ta-
tum, Yeon Building, Portland, Oregon, beginning
at the hour of 4:00 p.m. [1]*

Appearances: Mr. Erskine Wood, of Attorneys
for Plaintiff. Mr. Arno H. Denecke, of Attorneys
for Defendant.

* Page numbers appearing at top of page of Original Depo-
sition.

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

Stipulation

(At said time and place the following stipulation was entered into between the attorneys present in behalf of the respective parties:)

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record, that the deposition of Clyde R. Toole, an adverse party witness produced in behalf of Plaintiff, may be taken at this time and place before Gordon R. Griffiths, a Notary Public for Oregon and an Official Reporter of the above-entitled Court, and in shorthand by the said Gordon R. Griffiths.

It is further stipulated that said deposition, when fully transcribed, may be used on the trial of the above-entitled cause as by law provided; that all questions as to notice of time and place of taking the same are waived; that all objections as to the form of questions are waived unless made at the time of taking said deposition, and that all objections as to materiality, relevancy and competency of the questions and answers are reserved to the parties until the time of trial. [2]

CLYDE R. TOOLE

an adverse party witness produced in behalf of Plaintiff, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Denecke): Mr. Toole, would you

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

state exactly your position with American Mail Line?

A. This is not on the record. You mean at the time of this incident?

Q. That would be it.

A. Yes, Port Engineer.

Q. I take it you are now in a different position?

A. Yes.

Q. Were you the Port Engineer in Portland at the time? A. Yes, in Portland.

Q. So we are straight, this happened in April, 1955.

A. Yes, at the time of this I was Port Engineer here.

Q. The work that was to be done by Albina generally was work on the "Annual," that is, preparing the ship to pass its annual inspection; am I correct in that?

A. Yes, annual inspection and voyage repairs were the work that was being accomplished.

Q. Tell me generally on procedure on an "Annual" do you or the people working for you, do you go over the vessel and determine generally what work has to be done to accomplish the [3] voyage repairs or to prepare it for its annual inspection?

A. We receive requisition for repairs from the vessel, the other side, which are screened, and from that specifications for repairs are prepared, and there it is known what is required for the "An-

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

nual," pieces of machinery that must be opened up and equipment that must be opened up for survey by the Coast Guard at the time of the annual inspection. They were prepared in this instance, as in all instances, and bids were taken. As the Albina was the low bidder, the work was then awarded to Albina. During the course of an annual inspection there are some things that arise that cannot be foreseen such as repairs that are exposed at the time of opening up various portions of the equipment. There are certain things that a surveyor, the surveyor for the Coast Guard, might require to be accomplished which is given to the yards to accomplish at that time on a negotiated price basis. That is the way the repairs are put into hand and consummated.

Q. You mentioned right at the beginning—I didn't catch it too clearly—the "other side."

A. The other side?

Mr. Wood: He means the other side of the ocean, I think.

Mr. Denecke: That is what I was going to ask you.

The Witness: Oh, we will receive from a foreign port, our instructions to the officers on the ship are sent in a [4] repair requisition from the last port of call or very close to the last port of call, depending on their schedule, and, of course, if they know they are going to get into port at midnight and sail at 8:00 the next morning they

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

should have everything prepared at the port prior to that one, or they wouldn't have an opportunity to get that to the mail.

Q. I have three documents I am going to have marked as exhibits.

(Document, Specifications for Repairs, April 1, 1955, consisting of six pages, marked Defendant's Deposition Exhibit (Toole) 1 for Identification.)

(Document, Specifications for Repairs, April 7, 1955, consisting of nine pages, marked Defendant's Deposition Exhibit (Toole) 2 for Identification.)

(Document, Damage Repairs—Deck Department, April 7, 1955, marked Defendant's Deposition Exhibit (Toole) 3 for Identification.)

Q. (By Mr. Denecke): All three of these, Mr. Toole, and I am referring to Defendant's Exhibits 1, 2 and 3 for Identification, were delivered to me, and it is stated that they were [5] copies, as they are obviously, copies, and not originals of the various specifications for the work on the Java Mail, and I might point out, Mr. Wood, that on 1 there is something stamped on it that obviously—well, I doubt if it is on the original, but other than that I think that they are the same as the originals should be.

I hand you Defendant's Exhibit 1 for Identification and ask you if generally, without examining

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

it in detail, and you might look at the last page here, too,—

A. Yes.

Q. —if that appears to be the specifications that refers—that is, let me put it this way—the first set of specifications on this job?

A. This would be the set that was bid on, 1. It covers the usual annual inspection items. I presume that it is. We have ours. I would have to compare it against ours to know exactly, to state that it is.

Q. Yes, I understand. Does it appear to be a copy of your signature? A. Yes.

Q. Looking still at Exhibit 1 here, and if you would like to spend a little time looking, the only reference I see to any lifeboats, and I will ask you to look a little more through it, is on Page 2, Item B-2?

A. Well, this Item 5 is our— [6]

Q. Excuse me, Item 5,—B-2 out there (indicating).

A. Yes, B-2 is the Class Number. That is our standard specification for annual inspection on lifeboats. Now, this weight testing that was requested later is not always accomplished. It is accomplished at the request of the Coast Guard.

Q. Just so we are certain, and if you care to look at it, Mr. Toole, you probably know these by memory practically. A. Yes.

Q. So far as you know, and you can examine

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

this if you care to, is that the only specification in Defendant's Exhibit 1 referring to the lifeboats?

(At this point in the taking of the deposition the witness was called away temporarily and returned, whereupon the following proceedings were had:)

Q. (By Mr. Denecke): You were going to look that over and see if there is anything else. I can tell you on the record I have looked it over, and I didn't see anything.

A. I don't believe there is. That is usually our only standard item. No, that is the only item in there pertaining to lifeboats.

Q. As I understand it from what you said, Mr. Toole, and from what I know, that at some time, I believe after the work for the "Annual" actually began, that the Coast Guard representative [7] stated he wanted a lifeboat test?

A. A weight test, yes.

Q. A weight test?

A. Yes, that is correct. They requested that we weight-test the lifeboats.

Q. Am I correct that that was sometime either just at the time work began or just after it began?

A. That is correct, during the course of the annual inspection.

Q. Then do you recall, did you talk to Dick Bailey of Albina and tell him that the Coast Guard wanted a lifeboat weight test?

A. Yes, and to do it.

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

Q. To do it? A. Yes.

Q. Do you recall your conversation with him? What did you say, or was it, in effect, "The Coast Guard wants to weight-test the lifeboat. Would you do the necessary or take care of it?"

A. It could have been that, along those lines. I would not have told him in detail because such a thing is not necessary. He would have come to me with any request he had as he would run into any difficulty doing it, such as the use of winches to handle his weights with, if he cared to use winches. That is their prerogative to decide how they do it unless I think they are doing it inefficiently or in such a manner as is going [8] to cost us more money to have it accomplished the way they want to do it.

Q. What is done in a weight test?

A. Well, I can tell you in this instance, well, there are various ways that the weights can be handled, various types weights that can be used, but in this instance of boats being stripped of their equipment, their gear previously such as oars and a tiller and sail and other equipment that is standard requirement for lifeboats, it had been removed for examination of each piece by the Coast Guard. In this instance as the easiest way to put the weights in the boat they floated the boat. They moved the boat aft the No. 5—I believe it could have been No. 4, but I think it was No. 5 is the one they used in this instance—they brought sacks

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

of sand down on the brake, swung across the ship, and lowered it into the lifeboat with the ship's gear until they put the required amount of weight in the boat, and they floated the boat under the falls. They then hooked the boat onto the falls and raised it sufficiently high out of the water to hold it sufficiently long until the Coast Guard surveyor on the job was satisfied that everything was fine. During that time he would be looking at the boat, at the cables, at the hooks, at all gear pertaining to handling the lifeboat, and he then, I assume, told them that everything was all right, at which time they would have re-floated the boat and used the [9] gear again, removed the weights, floated the boat up under the gear again and then raised it up to the position from which they took it which was in a position where the boat rests at all times at sea.

Q. Would you require the weight testing—

A. I did not follow the job very closely, no.

Q. Is there anything to be done in the weight test by Albina or whoever else it is that is doing it, some other repair yard, other than placing the sand or whatever other weights they want to put in the boat and raising it or lowering it as the Coast Guard inspector directs?

A. They have all handling of the boat.

Mr. Wood: What was that answer?

(Last answer read.)

Mr. Wood: The boat and its related equipment?

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

The Witness: That is what the job is being accomplished to do, an actual weight test of the boat itself to see that the boat itself is strong enough to support this required amount of weight free and clear of the water so you do not break the back of the boat, for instance, your plating, and the framing of the boat is strong enough to support that weight. It is also to test the hooks, cables, the sheaves, the brake on the lifeboat winch, and the motor, whether the motor is strong enough to raise the boat with this weight in it. [10]

Q. Do you know, does the Coast Guard normally—as long as you were not there—normally does the inspector from the Coast Guard tell the ship repairer what to do? By that I mean, “Raise it now; hold it there so long; lower it”?

A. The Coast Guard does not issue orders to the yard. They work every way possible to assist the yard. The yard may ask the Coast Guard inspector on the job, “Is this boat high enough out of the water?” And he would say “Yes,” or “No,” or “I would like to have it a little higher if possible,” words to that effect.

Q. Yes.

A. He does not assume authority to order the yard to do anything. If he had objections about the yard's work, the way the yard was accomplishing something, he could advise them not to do something. He would not order them not to because if anything is broken he could not carry the re-

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

sponsibility of it. He is not there as the owner's representative; he is not there as a representative of the yard; he is representing the Government. He is there to witness.

Q. Does he also in the course of the weight test inspect the things that you mentioned like the falls, sheaves?

A. Oh, yes; the davits, the falls, sheaves and davits. That is his job, also, to satisfy himself that the strength is there, that everything is in proper operating condition.

Q. If something is—if the Coast Guard finds that something [11] is not proper operating condition, do they call it to the owner's attention, then?

A. Yes; yes, if they see something that is not in proper operating condition they bring it to the owner's attention. The owner then orders the yard to make the repairs.

Q. There were some specifications——

A. He might—you know, men working together, the Coast Guard might tell a workman, "Well, I don't like that. That must be fixed." That, of course, is idle conversation.

Q. There were some specifications then made up, and by "made up" I mean mimeographed, I take it, that is what these are, or duplicated in some way for this lifeboat test in addition to some other matters. Now do you know whether or not these—

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

here, let me show you what I have in mind here.
It is marked Defendant's Exhibit 2.

A. I assume this is a supplement, too.

Q. I think this is marked "Supplement 1."

A. Yes.

Q. Do you know, Mr. Toole, whether or not that supplement was furnished to Albina prior to the actual weight testing?

A. I doubt that it was; I doubt that it was.

Q. It is my understanding that the reason that this is prepared is that—not only this but these supplements that almost always accompany an "Annual" like this—is that they take care of it, put something down in writing so that the owner [12] in the repair yard will know at the end just what is being asked for and what has been done.

A. Yes, these are prepared from the full knowledge that we have of the vessel at the time of the preparation of the specs, as completely as possible.

As I said before, you start going through the equipment, the machinery, and we will find things that are hidden before, things that are not where they are visible where it can be sighted. If you would know that they are wrong or you might know something was wrong but the men on the ship would not know exactly what it was, nor could I tell until it was opened up. Say the inside of a pump, if the pump is not pumping properly you know something is wrong, but you don't know exactly what it is until we can get it opened and

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

see it. Then these repairs are ordered. It is what we call extras in the terms of ship repair. Then we wait until the job is all done. These are kept track of by the yard, by myself in this instance. You will notice in here that we have cancellations perhaps.

Q. Yes, I am sure there are there.

A. Additions, cancellations, it is alteration that we must make to these specifications on portions of it that arise during the time of accomplishing the repairs. We, as a rule, do not print these, do not run them out in our office until the job is completed. A running record of these are [13] kept both by the yard and by myself; when I authorize a yard to do the work I make my notes on it. The yard does, also. The yard knows what they have to do; they have to order the equipment and men to accomplish repairs with. They know what is wanted and have to order the men accordingly along with the materials.

Q. On the weight testing, then, did I understand it correctly, Mr. Toole, that you told Dick Bailey at some time before the weight testing was accomplished that the Coast Guard wanted the lifeboat to be weight-tested?

A. I couldn't say what my exact words were to him. I instructed him to proceed to accomplish the weight test for us, yes.

Q. Then at some time, depending upon when

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

the job is finished, that instruction or an extra, in effect, as well as other extras——

A. Was verified so that they could put in for payment with this supplement.

Q. I hand you Defendant's Exhibit 3 for Identification which—I think I can shorten this—I understand, Mr. Toole, and see if I am correct, covers work to the lifeboat necessitated by its falling?

A. And associated equipment.

Q. And associated equipment?

A. Yes; that is correct. [14]

Q. And that this also, while it is dated April 7th, as well as Defendant's Exhibit 2 dated April 7th, was issued on or about the end of the job?

A. Yes.

Mr. Wood: Is that 3?

A. Yes, sir; this is 3.

Mr. Wood: Let us see what we are talking about.

A. That is repair work to the lifeboat after the damage was done (presenting document to Mr. Wood).

Q. (By Mr. Denecke): Do you recall, Mr. Toole, —maybe I have it here—was the job finished about the 10th of April? A. I would not recall that.

Q. My best information is it started the 5th. Normally, how long would an "Annual" on this type of vessel take, or is there any such thing as a normal time?

A. Well, it is hard to say. It depends on the

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

work load the yard is carrying at the time the vessel will be in port. We have——

Q. Excuse me. To save time, the American Mail records here in Portland will show when the job was finished, I take it?

A. This gives the date of the vessel's arrival. We say, "Repairs to be completed before noon, Thursday, April 7th." That was our instructions at the time of the bidding. On the supplement you will notice "Work to be complete April 10th." [15]

Q. That would indicate, then, that probably she was to be finished, if everything went according to schedule, on the 10th?

A. Yes, everything should have been finished then. I don't know what the other one states.

(Document presented to the witness.)

I would say that it was completed, from what I can interpret from this now, this lifeboat work was supposed to have been accomplished here, but Albina did not finish the work here in the Portland area. We had to go to Longview to finish the work. The Coast Guard inspector rode down with me, as I recall it. We finished, as I recall, it was on a Saturday; I know it was midnight perhaps when we got away from the vessel after completion of repairs. It was very late in the evening.

Q. Mr. Toole, did you, or have someone, conduct any sort of an investigation as to what caused the lifeboat to fall?

A. I asked questions myself of the men on the

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

job who were in the vicinity of the boat. We had attorneys. They took pictures immediately. I did not take anyone's story on it under oath or anything on that order, only I was aboard the vessel when it happened. I heard the—I heard it happen. I stepped out on deck immediately and got a fast story from several right there at the time.

Q. Did you order any repairs to be made which you believed [16] might correct a possible cause of the fall?

A. Under the circumstances of the way the boat was handled after the weight test was completed, there was no repairs to be made. I asked for no repairs that would correct anything on the—that might be, that might be in any way part of this.

Q. The statement has been made, and I think the charge was made—well, let's leave it this way, that at least one or more persons have stated that a possible cause was the fact that, I will call it a swivel, my terminology might be bad here—

A. Yes.

Q. —even with the keeper down on the release gear could slip over the hook. Is my terminology good enough to make myself understood?

A. I know what you are trying to say, that the link could become disengaged without releasing the releasing gear. That could only occur if the weight of the boat were borne by the water or in some other manner. As long as the strain is on the cable, that is impossible, and the story that I, as I re-

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

ceived it, was that the strain of the boat was never off of the cable, off of the hook, from the time Albina men lifted the boat until the boat became disengaged on the after end. I am not speaking from first-hand knowledge. I am speaking of the story that was told me by the men who were there in the vicinity. [17]

Q. I will ask you your opinion, Mr. Toole, based upon the facts that you have, as to whether or not you arrived at any conclusion or have an opinion as to what caused the boat to fall?

A. My conclusion—

Mr. Wood: I think you are going a little far on that. He was not there. He didn't see it. I do not think you can ask his opinion about it.

Mr. Denecke: I am asking, Mr. Wood, because I am assuming without even proof that he would qualify as an expert.

Mr. Wood: Yes, I think he would qualify as an expert.

Mr. Denecke: Even though I realize that he was not looking at it when he fell there, but I think he would be entitled—I mean he is certainly qualified to testify as to that.

Mr. Wood: Yes, he is, but I do not know whether you are entitled to his expert opinion; but go ahead. I will withdraw the objection.

The Witness: I think, Mr. Wood, I have just answered the question already, that the hook, properly engaged, could not possibly disengage itself

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

unless the releasing gear was released or the weight of the boat was carried by the water or in some other manner which is——

Q. (By Mr. Denecke): Because I am not an expert in this field, I am going to have to ask you this: By that statement [18] are you, in effect, saying that that could not have been the cause of the fall in this particular instance, then?

Mr. Wood: What could not have been?

The Witness: What could not have been?

Q. (By Mr. Denecke): The fact that it was possible, assuming it was possible without stating it was, for the ring to be released even though the keeper was down. I say "keeper was down" even though the releasing gear was fastened.

A. Well, as I just said——

Mr. Wood: I do not think that is a very clear question. It is not entirely clear to me.

The Witness: I don't quite understand it either.

Mr. Denecke: I will ask it over again to see if I can state it a little clearer.

Is it your opinion, then, Mr. Toole, that the cause of this particular fall or that this fall could not have been caused, the fall of this lifeboat could not have been caused by the fact, if it were a fact, that the ring or swivel, even with the keeper locked, if that word is correct, could have slipped over the hook?

A. I still don't quite understand. I don't know quite how to answer. As I said, once the link on

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

the end of the fall is properly hooked, properly placed on the hook of the lifeboat, it is impossible for it to become disengaged unless the boat is water-borne or the releasing gear is released. [19]

Q. I follow you then. I think I can clear this up with one more question.

A. Yes. In other words, the weight is hanging down all the time, and it can't possibly climb out.

Q. Now, then, in this instance I think it is an admitted fact that the lifeboat, after the sand was taken out, was not in the water then,—that is, not in the water until after the——

Mr. Wood: Yes, it was in the water after the sand was taken out.

The Witness: It was in the water at the time the sand was taken out.

Q. (By Mr. Denecke): At the time the sand was taken out?

A. It was in the water at the time the sand was removed.

Q. Right. From then it was raised again, and so far as we know——

A. After removal of the sand.

Q. After removal of the sand? A. Yes.

Q. Then it was in the process of being lowered when it fell or either in the process of being lowered or was hanging up there in the davits?

A. Stationary.

Q. Stationary?

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

A. At the time; that is the way I understand that it was, yes. [20]

Q. Well, I am still not clear here. The thing I am trying to find out or get your advice on is, do you think it is possible that the ring could have been so improperly secured at the time the lifeboat was in the water and stayed improperly secured when the lifeboat was raised and held up there stationary, or as soon as the weight was put on, would it have slipped back into its correct place?

A. I would say that it was not securely placed. It was not placed in its proper position. It rose on a point during the time of raising the boat during the time of, between the time it was lifted out of the water after removal of the weights until it let go.

Q. Now, then, I think I understand what you said when you said you had already given your opinion.

A. Yes.

Q. In your opinion, then, is that what caused it to fall?

A. Being improperly attached, improperly attached; yes, correct.

Q. That is was, well, improperly attached?

A. Yes, that is the best word, I believe.

Q. I think that is all.

Cross Examination

Q. (By Mr. Wood): Let me see Exhibit 2. [21]
(Document presented.)

Mr. Toole, an item on Page 2 of this Exhibit 2, I

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

know you are familiar with the weight test, port and starboard lifeboats and equipment, "Furnish weight, 165 pounds per person for 66 persons capacity, and accomplish weight test of each the Port and Starboard lifeboats, cables, davits, and so forth"?

A. Yes, sir.

Q. I take it that means, in fact it actually says it, it is to test all the equipment of the boat, is it not?

A. Yes, sir.

Q. Is that the normal kind of a test that is made? I have in mind that you said this was written out after you and Albina had had an understanding from your notes as to what was to be done?

A. Yes, sir.

Q. But I suppose that this was more or less a routine writing up of what you both understood would be done?

A. Yes, sir.

Q. Did you make notes on that, both of you?

A. Yes, he would have had it on his, I am sure. I wouldn't have had it on mine. At the finish of the repairs or toward the finish of the repairs we sit down somewhere and compare the notes to make sure that I have everything that has been accomplished and to make sure that he has accomplished everything [22] that I have instructed him to accomplish.

Q. Regardless of your notes, however, I imagine that tests of this kind are more or less routine, pretty well understood conventional kind of a test;

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

are they not? Put it this way: When you ask a man in a repair yard to make a lifeboat test on weights, isn't it always understood he will test the equipment along with it?

A. A weight test; yes, sir. In this particular instance was one of the first water tests that had been accomplished here in Portland for quite some time. It was the first one on one of our vessels that was accomplished in the Portland area for quite some time. We have accomplished quite a few since.

Q. Would you think this was routine if afterwards it expressed the true understanding that both of you men had? A. Yes, sir.

Q. Before the work was done?

A. Yes, sir; Albina's representative thoroughly understood the work that was to be accomplished.

Mr. Wood: That is all.

Redirect Examination

Q. (By Mr. Denecke): Mr. Toole, in a weight test is it your understanding that the repair yard is to inspect all the equipment which [23] would support the boat? By that I mean the davits and the——

A. No, the yard does not necessarily have to inspect that. The yard is responsible for any portion of it that they handle, so that they handle it properly.

Mr. Wood: They do not handle davits, do they?

The Witness: No, sir; no, sir; the davits are not

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

touched by hand at all. The cables themselves are not attached by hand at all. It happens that the hook or the link is attached through a sheave to the cable.

Q. (By Mr. Denecke): Am I correct, then, that it is your belief that if those—it is your belief that if Albina failed in any respect here, and I am saying if they did, that their failure was to see that this ring was not properly secured?

A. Yes, sir.

Q. Not that they—your answer was “Yes,” I take it, as to that? Your answer was “Yes,” I take it, to the statement that I made there?

A. That their only failure on this job was to properly secure the boat to the——

Q. Secure this ring that we have been talking about?

A. Yes, properly hook the boat onto the fall after the test was accomplished.

Q. Do you know on this particular boat, Mr. Toole, with it resting on the water was it possible for the ring to become [24] disengaged even though the releasing gear was shut? A. It was, yes.

Q. It was? A. Yes.

Q. Am I correct, I do not know whether I am on this, I will have to ask you, that either at Longview or subsequent to the accident that was remedied?

A. It was partially remedied. That is, an attempt to remedy it was—well, that is not quite correct—the hooks were altered slightly, the fingers,

Defendant's Exhibit No. 11—(Continued)

(Deposition of Clyde R. Toole.)

say, not the hooks, the fingers, were altered slightly, but, floating in a certain way with a certain amount of slack in the falls, the hook, the ring will still become disengaged from the hook.

Q. With the releasing gear shut?

A. Yes, without being touched.

Q. As the Port Engineer, do you consider it the duty of the repair yard in conducting a weight test—not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the ring to become disengaged when it is resting in the water?

A. No, that is not necessarily part of their work. Their responsibility is to report anything they do see wrong to me.

Q. Do they have the duty when they are asked to do the weight test here, do they have the duty, do you consider, to [25] inspect the ring to see whether or not it would disengage?

A. Would disengage; no.

Mr. Denecke: That is all. Do you have any more questions, Mr. Wood?

Recross Examination

Q. (By Mr. Wood): Yes; if they saw, if the ring would disengage under conditions when it should not disengage, in other words a defect in the ring or the hook, would it be their duty to report it to you? A. Yes, sir.

Defendant's Exhibit No. 11—(Continued)
(Deposition of Clyde R. Toole.)

Q. Yes. In other words, if the swivel ring would disengage properly, when it should disengage, naturally they would accept it and would not report it?

A. Yes, sir.

Q. If, however, there was anything wrong with the hook—I was about to say the equipment, but we are talking about the hook and the link so we will talk about that—if they see anything wrong with that, wouldn't it be their duty to report it to you? A. Yes, sir.

Q. And fix it? A. Yes, sir.

Q. On your order? [26]

A. On my orders; yes, sir.

Mr. Wood: That is all.

Redirect Examination

Q. (By Mr. Denecke): That is also, and going on with Mr. Wood's question, that is also what the Coast Guard are to do, also, aren't they?

A. Yes.

Mr. Denecke: Do you have any further questions?

Mr. Wood: No.

Mr. Denecke: Mr. Toole, you have the right to read and examine and sign this deposition after it is transcribed, if you care to. If you desire to waive that after consulting with Mr. Wood, you can.

(Discussion off the record.)

The Witness: I will read it.

(Deposition concluded.) [27]

[Endorsed]: No. 15829. United States Court of Appeals for the Ninth Circuit. Albina Engine & Machine Works, Inc., a corporation, Appellant, vs. American Mail Line, Ltd., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 6, 1957.

Docketed: December 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

2. The Trial Court erred in finding that the defendant breached its contract with the plaintiff concerning the Java Mail and in finding that the defendant discovered that said equipment was dangerous (Finding of Fact 6).

3. The Trial Court erred in finding that the plaintiff did not know of and had no reason to suspect the existence of said defect (Finding of Fact 7).

4. The Trial Court erred in finding that the plaintiff was not negligent nor at fault for not inspecting the swivel and hook keepers before commencing the boat drill and was not otherwise negligent in any respect (Finding of Fact 9).

5. The Trial Court erred in concluding as a matter of law that the defendant breached its contract with the plaintiff and that judgment for the plaintiff and against the defendant should be entered.

The appellant hereby designates the part of the record which it thinks is necessary for the consideration of the points on which it intends to rely on appeal, such designation is as follows:

The complete record and all the proceedings and evidence in the said action which shall include:

Pleadings

Pre-trial order

Transcript of testimony

All exhibits except plaintiff's Exhibit 6

Findings of fact and conclusions of law and objections thereto

Judgment

Notice of appeal

Undertaking on appeal.

MAUTZ, SOUTHER, SPAULDING,
DENECKE & KINSEY,

/s/ By ARNO H. DENECKE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 26, 1957. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the respective parties hereto acting by and through their respective attorneys that the parties hereto request the Court to be relieved from printing or reducing appellee's (Plaintiff's) Exhibit 1, such exhibit being Rules and Regulations for Cargo and Miscellaneous Vessels, except that Pages 9 and 10 of said exhibit be printed.

It is further stipulated by and between the respective parties hereto acting by and through their respective attorneys that the parties hereto request

the Court to be relieved from printing or reproducing appellee's (plaintiff's) Exhibit 6, which was the statement of John J. Stene for United States Coast Guard, which is for impeachment only.

These stipulations are on the grounds and for the reason that said exhibits or the portions of said exhibits which the parties request that they be relieved from printing or reproducing are irrelevant and immaterial in the proceedings.

/s/ ARNO H. DENECKE,

Of Attorneys for Appellant.

/s/ ERSKINE WOOD,

Of Attorneys for Appellee.

[Endorsed]: Filed Dec. 26, 1957. Paul P. O'Brien, Clerk.

No. 15831 ✓

**United States
Court of Appeals**
for the Ninth Circuit

SANI-TOP, INC, a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

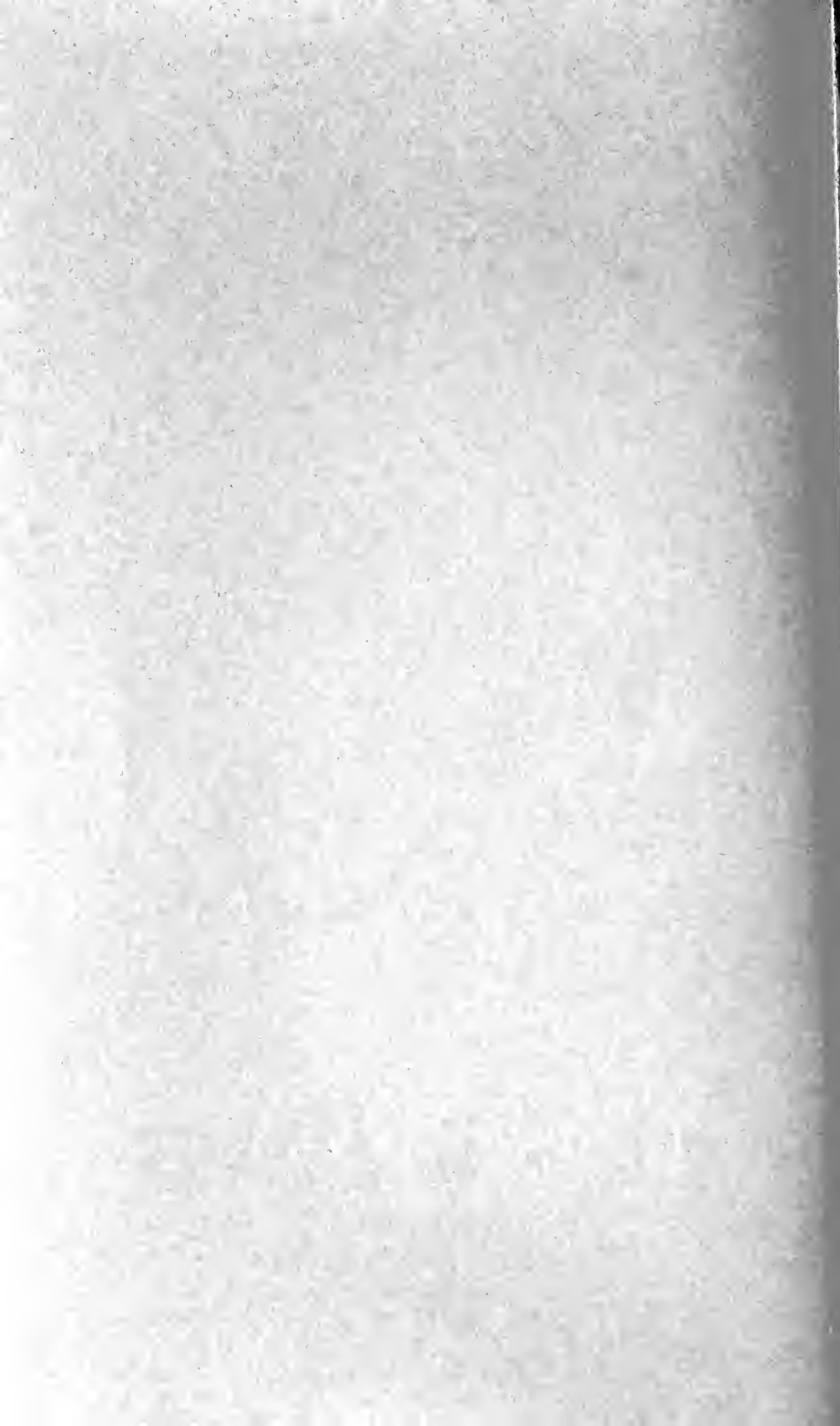
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**

FILED

FEB 28 1958



No. 15831

**United States
Court of Appeals**
for the Ninth Circuit

SANI-TOP, INC, a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

No. 839-57-WB

SANI-TOP, INC., a Corporation,

Plaintiff,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Defendant.

COMPLAINT FOR DECLARATORY
RELIEF

Plaintiff, by its attorneys above named, for its
Complaint herein avers:

1.

This is a suit for declaratory relief. Jurisdiction resides in this Court under the Federal Declaratory Judgment Act, coupled with diversity of citizenship and with the patent laws of the United States.

2.

At all times hereinafter mentioned, plaintiff has been and now is a corporation incorporated under the laws of the State of California, having its principal place of business in the County of Los Angeles, State of California.

3.

Upon information and belief, at all times hereinafter [2*] mentioned, defendant has been and now

*Page numbering appearing at foot of page of original Certified Transcript of Record.

is a corporation incorporated under the laws of the State of Delaware, and has a regular and established place of business in the County of Los Angeles, State of California.

4.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

5.

Defendant purports to be the owner of all right, title and interest in and to United States Patent No. 2,433,643 relating to a certain process.

6.

An actual controversy within the jurisdiction of this Court exists, within the meaning of 28 United States Code, Section 2201, in that defendant has charged that plaintiff is infringing said patent by using said process without defendant's permission and without paying royalties to defendant. Plaintiff denies that it is using the process patented in Patent No. 2,433,643, and plaintiff further avers that said Patent No. 2,433,643 is invalid and unenforceable.

7.

Defendant's charge that plaintiff is using the patented process has been embodied, inter alia, in certain statements made on behalf of defendant by its counsel, Arch R. Tuthill, Esquire; by certain averments made by defendant in a Complaint filed against the present plaintiff on November 13, 1956,

in the District Court of the United States for the Southern District of California, Central Division (subsequently assigned No. 20723-TC); and by certain statements made by and on behalf of defendant in a document filed in said litigation No. 20723-TC entitled Plaintiff's Statement of Reasons and Memorandum of Points and Authorities in Support of Motions to Strike and Dismiss. Details [3] of the charge of patent infringement thus made by defendant are set forth in the attached affidavit of Warren T. Jessup.

8.

Plaintiff has not and does not use the process patented in said Patent No. 2,433,643, and has not and does not infringe said patent.

9.

If said Patent No. 2,433,643 is accorded a construction broad enough to cover the process practiced by plaintiff, then said patent is to such extent invalid.

10.

Plaintiff does not infringe said Patent No. 2,433,643 because during the pendency of the patent application from which said patent matured, the applicants so limited the disclosure and claims of their application that the defendant is estopped from now seeking or obtaining a construction of any of the claims of said patent sufficiently broad to cover or embrace any process employed by plaintiff.

11.

Said Patent No. 2,433,643 is invalid and void because the alleged invention or discovery referred to and claimed therein was and is not patentable to the alleged inventors named therein.

12.

Said Patent No. 2,433,643 and each and every claim thereof is invalid and void because more than one year prior to the application date thereof the alleged invention or discovery referred to and claimed therein was in public use or on sale in this country, and known and used by others.

13.

Patent No. 2,433,643 is invalid and void because the subject matter thereof was obvious to a person skilled in the [4] art as it existed at the time the invention claimed therein was made; the applicants for said patent were not the original or first inventors of any material or substantial part of that which is alleged to have been invented or purported to be patented in said Patent No. 2,433,643; and the alleged inventions and discoveries, if any, were previously made by others than the inventors named in said patent.

14.

Said Patent No. 2,433,643 is invalid and void because it represents an attempt to obtain patent monopoly over a discovery of nature, i.e., a property of a certain material.

15.

Said Patent No. 2,433,643 is invalid and void because the invention claimed therein is anticipated by and/or does not represent the exercise of patentable invention over the disclosures contained in prior art patents and publications, the identity of which plaintiff is now in the process of determining, and which will be announced to defendant in due course, pursuant to Title 35, United States Code, Section 282.

16.

Said Patent No. 2,433,643 is invalid for the reason that all of the elements or steps thereof are old in the art, and said elements or steps, and each of them, in the combination claimed to be new do not co-act to produce a new and unobvious result which differs from the obvious result to be expected from each of the old steps previously known to the art. The process claimed to be new and patentable fails to meet the tests of invention set forth by the Supreme Court of the United States in *Great Atlantic and Pacific Tea Company vs. Supermarket Equipment Corporation*, 340 U.S. 147, 95 Lawyers Edition 163. [5]

17.

Said Patent No. 2,433,643 is invalid because the specification and claims thereof do not describe the invention in such full, clear, concise and exact terms as to enable any person skilled in the art to practice the invention, and the claims of said patent do not particularly point out and distinctly

claim the subject matter which the applicants regarded as their invention.

18.

Said Patent No. 2,433,643 is unenforceable because defendant has employed said patent as a device to monopolize the entire postforming industry, both within and without the scope of said patent, and as a device to collect royalties for the use of methods and processes outside the scope of said patent, in that defendant has by intimidation extended the scope of said patent to cover unpatented and unpatentable processes and has collected royalties thereon.

Wherefore, plaintiff demands:

1. That said Patent No. 2,433,643 be declared and adjudged invalid, unenforceable and/or not infringed by any act of plaintiff.
2. That defendant be enjoined from uttering further charges that plaintiff infringes said Patent No. 2,433,643.
3. That plaintiff recover its costs, disbursements and attorneys' fees herein.
4. Such other, further and different relief as to this Court may seem just and proper in the premises.

HERZIG AND JESSUP,

By /s/ ALBERT M. HERZIG,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF WARREN T. JESSUP

State of California,
County of Los Angeles—ss.

Warren T. Jessup, being duly sworn, deposes and says:

I am a partner in the firm of Herzig and Jessup, patent counsel for the plaintiff identified in the above caption.

On Monday, April 8th, 1957, at about 11:00 a.m., I was present in the Courtroom of the Honorable Thurmond Clarke and heard Mr. Arch R. Tuthill present certain statements and arguments on behalf of, and as representative of, North American Aviation, Inc., the defendant named above. These statements were made by Mr. Tuthill on behalf of North American Aviation, Inc., while speaking in support of a certain Motion to Dismiss and to Strike, which were being brought by North American Aviation, Inc. in Civil Action No. 20723-TC in the District [7] Court of the United States for the Southern District of California, Central Division. This suit, No. 20723-TC, was brought by North American Aviation, Inc., as plaintiff, against Sani-Top, Inc., as defendant, to collect alleged royalties due under a certain license agreement.

In the course of this argument, Mr. Tuthill, speaking of Sani-Top, Inc., and also of another

manufacturer of postformed material, Bonded Products Co., said:

“It is a fabricator of the material. It provides the raw material. It uses the process. It bends the material.”

Subsequently in his argument, and still referring to Sani-Top, Inc. and Bonded Products Co., Mr Tuthill spoke as follows:

“Now the defendant is using the process continuously and is not paying royalties. We believe that an accounting is necessary to determine the exact amount owing.”

In speaking of the “process” Mr. Tuthill was referring to the process disclosed and claimed in United States Patent No. 2,433,643, W. I. Beach, et al., owned by North American Aviation, Inc.

On April 8th, 1957, the date of Mr. Tuthill's statements, neither Sani-Top, Inc. nor Bonded Products Co. was a licensee under said Patent No. 2,433,643, and had not been since October 22nd, 1956, on which date each rescinded and repudiated a certain license agreement under Patent No. 2,433,643 which each had previously entered into.

Despite this repudiation, defendant herein, North American Aviation, Inc. sought an accounting against plaintiff [8] herein for all postforming operations performed by plaintiff from August 20th, 1951, and continuing indefinitely thereafter. This accounting was sought in a complaint filed November 13th, 1956, by North American Aviation, Inc.

against Sani-Top, Inc., which Complaint was assigned No. 20723 in the District Court of the United States for the Southern District of California, Central Division. In said Complaint, North American Aviation, Inc. sought an accounting from Sani-Top, Inc. in the following language.

“That an accounting be ordered to accurately determine the amount of all laminated sheet material postformed by defendant under said Process since August 20th, 1951, and the amount of royalties or license fees payable by defendant to plaintiff.”

North American Aviation, Inc., through counsel Flint & MacKay and Arch R. Tuthill, Esq., do not contend, and have never contended, that as of April 8th, 1957, the plaintiff herein was a licensee under said Patent No. 2,433,643. This is evident from the following statement made by North American Aviation, Inc. in said law suit No. 20723-TC and titled Plaintiffs' Statement of Reasons and Memorandum of Points and Authorities in Support of Motions to Strike and Dismiss, which Statement was served on January 31st, 1957. In said Statement, on page 8, North American Aviation, Inc., speaking through counsel, stated as follows:

“Obviously, at the date of defendant's purported rescission of the license agreement on October 22nd, 1956, plaintiff could, if it chose, have [9] filed suit for infringement and the filing of such suit would, in law, constitute acquiescence in defendant's rescission. However,

plaintiff chose to consider at that date and until January 1st, 1957, the license agreement still in force and, hence, in accordance with United Mfg. Co. vs. Holwin, *supra*, plaintiff sought its relief under the license agreement.”

/s/ WARREN T. JESSUP.

Subscribed and sworn to before me this 9th day of July, 1957.

[Seal] /s/ HAZEL Z. SHANNON,
Notary Public in and for Said
County and State.

My Commission expires January 15, 1961.

[Endorsed]: Filed July 9, 1957. [10]

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO
DISMISS COMPLAINT

North American Aviation, Inc., a corporation, defendant herein, hereby moves the court for its order to dismiss the complaint herein.

Said motion will be based on records, papers and files in the above-entitled action and also upon the records, papers and files in the case of North American Aviation, Inc., Plaintiff and Cross-Defendant vs. Sani-Top, Inc., Defendant and Cross-Claimant, No. 20723-TC, and in the action of North American Aviation, Inc., a corporation, Plaintiff

and Cross-Defendant, vs. Bonded Products Co., a partnership, et al., No. 20724-TC, both pending in the above-entitled court; upon the statement of reasons in support of this motion and upon the affidavit of Arch R. Tuthill, Esq., filed herewith. [11]

Dated September 16, 1957.

FLINT & MacKay,

By /s/ ARCH R. TUTHILL,

Attorney for North American
Aviation, Inc.

[Endorsed]: Filed September 17, 1957. [12]

[Title of District Court and Cause.]

AFFIDAVIT OF ARCH R. TUTHILL IN SUP-
PORT OF DEFENDANT'S MOTION TO
DISMISS

State of California,
County of Los Angeles—ss.

Arch R. Tuthill, being first duly sworn, deposes and says:

1. I am a member of the firm of Flint & MacKay and one of the attorneys for defendant herein. Attached hereto, and by this reference made a part hereof, is a true and correct copy of my argument to the above-entitled court on Monday, April 8, 1957, in the following cases:

(a) North American Aviation, Inc., a corporation, Plaintiff, Cross-Defendant, vs. Sani-Top, Inc., a corporation, Defendant, Cross-Claimant, No. 20723-TC.

(b) North American Aviation, Inc., a corporation, [13] Plaintiff, Cross-Defendant, vs. Bonded Products Co., a partnership, et al., Defendants, Cross-Claimants, No. 20724-TC.

Several statements which I made during the course of this argument are referred to in the Affidavit of Warren T. Jessup dated July 9, 1957, filed in the above-entitled action, which said Affidavit is referred to in the Complaint therein in Paragraph (7) on pages 2 and 3.

The argument to the court on April 8, 1957, and the memoranda of authorities then before the court all were directed to motion to dismiss and to strike cross-claims and counter claims interposed by the defendants in the two cases (No. 20723-TC and No. 20724-TC) hereinabove referred to.

The gist of the contentions advanced in behalf of North American Aviation, Inc., is that the complaints in those two actions sought to recover royalties under license agreements from their beginning dates to and including the quarter ending September 30, 1956 (See pages 5 and 6 of Transcript); the issues of patent invalidity were irrelevant to the action to the contract to recover royalties: that these alleged issues of patent invalidity were based on facts allegedly coming into existence subsequent to September 30, 1956, after which North American

Aviation, Inc. did not seek to recover royalties; that for this reason, among others, the alleged issues of patent invalidity were irrelevant and the cross-claims and counter claims therefor were improper.

The argument on April 8, 1957, and all statements made in connection therewith were directed therefor to a state of facts existing in the period during which North American Aviation, Inc., sought to recover royalties on and prior to September 30, 1956.

I categorically deny that I intended to state that subsequent to September 30, 1956, plaintiff herein was using the [14] postforming process or that it was in any way infringing Patent No. 2,433,643.

In the answers by North American Aviation, Inc. to interrogatories in said referred-to cases (No. 20723-TC and 20724-TC), North American Aviation, Inc. made it clear that in those actions it sought to recover royalties to and including September 30, 1956; that it did not in those actions demand royalties or an accounting for any period after January 1, 1957; that it did not charge that plaintiff herein had been using the process after January 1, 1957, as an infringer, in those actions.

North American Aviation, Inc. did not in those cases, take any positions whatever with respect to whether the licensees were or were not obligated to pay royalties after September 30, 1956.

In said two cases (Nos. 20723-TC and 20724-TC), an accounting is sought by North American Aviation, Inc. However, that accounting in those cases

is sought for the period ending September 30, 1956.
(See Transcript, pages 8-10.)

/s/ ARCH R. TUTHILL.

Subscribed and Sworn to before me this 17th day
of September, 1957. [15]

[Seal] /s/ BERNICE B. FRY,
Notary Public in and for Said
County and State.

In the United States District Court, Southern
District of California, Central Division
No. 20723-TC

NORTH AMERICAN AVIATION, INC., a Cor-
poration,

Plaintiff, Cross-Defendant,

vs.

SANI-TOP, INC., a Corporation,

Defendant, Cross-Claimant.

No. 20724-TC

NORTH AMERICAN AVIATION, INC., a Cor-
poration,

Plaintiff, Cross-Defendant,

vs.

BONDED PRODUCTS CO., a Partnership Com-
posed of Edgar D. Brown, Jr. and Walter
Junak; EDGAR D. BROWN, JR.; WALTER
JUNAK,

Defendants, Cross-Claimants.

Honorable Thurmond Clarke, Judge Presiding

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Monday, April 8, 1957, 11:00 A.M.

Appearances:

FLINT & McKAY, By
ARCH R. TUTHILL,
Attorneys for Plaintiff and
Cross-Defendant;

HERZIG AND JESSUP, By
WARREN T. JESSUP and
ALBERT HERZIG,
Attorneys for Defendants and
Cross-Claimants.

The Court: I will hear from Mr. Tuthill. You notice the hearing and the objections to the interrogatories came in late, as you know. I guess it was Thursday or Friday. Then this matter was added to the calendar.

Mr. Tuthill: That was in accordance with my understanding of your Honor's order.

The Court: That is right, but they came in so late, my thought was that, since I was trying a patent case all day Thursday and then Friday afternoon an injunction matter came in, in which I had to issue a restraining order against the Brotherhood of Railroad Trainmen, for the Union Pacific, and plus that I haven't had the time since to give this the necessary thought, I will, rather than making a ruling from the Bench, take this under submission.

because we worked right up until six o'clock and we have a pretrial hearing at 2:00 and a criminal matter at 3:00, so I haven't had a chance to go into the matter like I wanted to. So I am going to hear from you and then take it under submission.

Mr. Tuthill: Yes, Judge.

Concerning the interrogatories I believe that the decision with respect to objections will be the same as with respect to our motions——

The Court: Yes. [3*]

Mr. Tuthill: ——because basically we have objected to these interrogatories on the ground of their irrelevance, since they deal with matters concerning the validity or invalidity of the patent under which the license was executed, and we argue that none of those matters are relevant in this proceeding. Consequently, if the court agrees with our contentions that the defenses should be stricken or that the motion to dismiss should be sustained as to them, then a ruling should also be made sustaining our objections to the interrogatories.

Your Honor, this is a very simple action. It is an action by North American Aviation, the Plaintiff, to recover accrued and delinquent royalties under a contract.

North American Aviation is the patentee or the holder of the patent on a certain process. It has executed various licensing agreements, copies of which are before you as exhibits to the Complaints in these two cases, and I will treat both cases together.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Those license agreements are written. They are non-exclusive license agreements; they so state on their face, that there is granted to the licensee in each case a non-exclusive right, that is to say, a right with other licensees to use the patented process. More strictly I suppose it should be said a right to use the process but not the right exclusively to use the process in any area. [4]

North American has, as your Honor sees in these two cases, executed two of these non-exclusive license agreements in this same area. As a matter of fact, there are many more.

The process deals generally to what we call post-forming. Without going into the detail of the process, the sheet of material is bent and formed into an end product. Its most widely uses are panel surfaces for kitchen sinks, or counters in restaurants, bars, and the like, where a coved sink top, for example, will be made. This process is widely used today. This is a new industry, as we allege in the Complaint, which was started after World War II.

Now, the defendant is a licensee of this process. It is a fabricator of the material. It provides the raw material. It uses the process. It bends the material. It makes, for example, sink tops. A top may be bent at the top and down in the middle and around the edge also. It creates or it fabricates that material into the end result itself and sells and installs the product, for example, into many of the new subdivisions.

Now, the license agreement, and this is true in

both cases, provides for the payment of royalties at a calculated rate quarterly, with each division of quarters according to the calendar year. For the quarter ending [5] September 30th, for example, the royalties are payable on or before the 20th of October.

At the same time the royalties are payable, a statement with respect to the amount of footage used or the amount of material formed is supplied by the licensee accompanying the royalty statement.

So, regularly throughout the life of this agreement, the royalty is payable on the basis of quarters and by the expiration of 20 days after the end of each quarter. Now, that is important to remember in this case, your Honor, because here this action was filed on November 13, 1956. The amount of royalty that we seek to recover in this action is for the quarter ending on September 30th, 1956, not that quarter alone but over the antecedent quarters, based upon an accounting to establish the full amount of royalty which is payable for the time ending September 30, 1956.

As your Honor knows, for example, like a landlord under a lease, we could not sue under a lease until that rental is payable.

Therefore, all that we were entitled to recover under the Complaint as it was framed and filed was royalty payable during the period ending September 30, 1956. Those royalties were payable on October 20th.

Now, there is a dispute in this case as to the method [6] of computing these royalties which

should be paid for the use of the process under the license agreement.

The contract provides that the royalty is at the rate expressed, and there is no dispute between us, as I understand it, as to the rate. The contract provides, that the royalty shall be "computed" and I am quoting, "on the basis of material formed under the Process."

Now, from the date of the contract, in one case in April, 1949, and in the other case in August, 1951, I believe until about April of 1956, that is a period of 4 years in one case, in the other four and a half years in one case and several in the other, that dispute did not exist, your Honor. The royalties were paid during that period in accordance with this construction of the agreement, that is to say, that the royalties were paid on the basis of the amount of the sheet material which was used in the final end product, not simply the area of the material which was actually bent in forming the product.

North American has always taken the position that the product, the end product is the postformed product. You take a sheet of flat material and you bend it and you have a new form. It is now in this form, for example, or it may be in this form, for example, or it may be with a little by along the end; there is a new form made out of that sheet []

Consequently, up to April 1956, we had no disagreement with our licensees and royalties were paid by our licensees and royalties were paid on the basis of the footage used in that the material

kitchen sink, counter or panel. It might start out with a panel of 3 feet by 12 feet, which was bent in the center, but the royalty was payable on the basis of 36 square feet of sheet material which was used or employed in constructing that end product.

Now, as I say, there is a dispute in this case as to how these royalties are going to be calculated, but it is still a part of the action on the contract itself for the recovery of royalties.

Now, the defendant is using the process continuously and is not paying royalties.

We believe that an accounting is necessary to determine the exact amount owing.

Now, the defendants disagree with this preliminary statement or dispute this as being an action on the contract simply for the recovery of money and an accounting to determine the exact amount of money due and to resolve the dispute which exists between the parties, that is the construction of this royalty provision.

The defendants have sought to bring into this case an attack on the patent itself. They bring it in [8] by means of an alleged notice of repudiation which was delivered on October 22, 1956. That same notice, they say, if it is not a notice of repudiation, is a notice in accordance with the license giving the defendants the right to terminate it, it is a 60-day notice of termination.

Now, we have asked, and we do ask, your Honor to strike—first I should say to dismiss the first cross-claim and the second cross claim of the Answer.

The first cross-claim seeks declaratory relief as to the patent's validity on and after October 22, 1956.

The second cross-claim seeks declaratory relief as to whether the defendants' operations are within the scope of any valid claim of the patent.

Now, note the date of October 22nd, your honor. That is the date on which this alleged notice of repudiation was given, also notice of termination, notice of termination becoming effective the following January 1st. This introduces a state of facts which are not relevant to a claim which matured and existed on September 30th.

Remember, we are seeking to recover royalties in this case down to September 30th and not beyond that date. The defendant comes in and attempts to bring in [9] patent invalidity but relating only from October 22nd on. The defendant does not seek to raise patent invalidity for any date prior to October 22nd. As a matter of fact, as a matter of law he could not do so, in any event. So, for that one reason alone, your Honor, if it is not clearly pointed up in the briefs, that is why I have gone on a little longer than I normally would, for that one reason alone the defense of invalidity is completely irrelevant. The defendant does not have the power to bring into this case any action with regard to the patent.

This, your Honor, is North American's case on the contract for royalties to and including September 30th. We cannot transform that case into an action to determine the validity of the patent, when

the only basis for the claim of invalidity relates to events happening after September 30th of 1956.

The motion to strike is directed to the affirmative defenses which deal with patent invalidity. For example, item 1 is directed to a part of the First Affirmative Defense which alleges patent invalidity; item 2 is directed to part of the Second Affirmative Defense which alleges that on October 22, 1956, the defendant repudiated the license agreement, and which we say is completely irrelevant to the case; 3 is directed to a part of the [10] Second Affirmative Defense which alleges that the defendant is an infringer after October 22nd and that we must prosecute him on that basis. That we do not choose to do in this action. We may of course at a later date in another proceeding file an infringement case, but that is our choice and not the defendant's choice.

The Third Affirmative Defense we seek to strike which alleges patent invalidity; the Fourth Affirmative Defense which alleges patent invalidity; items 6 and 7 deal with patent invalidity; also 8 and 9 are related to patent invalidity.

Now I will not be much longer in my opening statement, your Honor.

I want to emphasize again that the defendant is estopped or the defendant has no right to bring into this present lawsuit any claim with reference to the validity of the patent which is based on events which took place after the date to which recovery is sought here.

It is elementary that during the conduct of license

relationship, the licensee is estopped to deny the validity of the patent.

If, assuming there is strength to the defendants' position, which we deny vigorously, to the effect that he can lawfully give a notice of repudiation on October 22nd [11] and thereafter stand in the position of an infringer to the plaintiff, telling me, "I am an infringer, I deny the existence of the license agreement, I refuse to pay royalties, I say the patent is no good, I am going to go ahead and use the patent in my business, come after me as an infringer," if there is strength to that defense, it can date only from October 22nd and not before. There is no authority to the contrary on that point and the cases cited by the defendants themselves sustain that view.

We have covered in our memorandum two additional points. One is that the failure of the plaintiff, the alleged failure of the plaintiff to prosecute infringers is not a defense in this action on contract, for there is no covenant in these agreements, your Honor, by which North American has undertaken to prosecute infringers. There is no mention of that subject in the agreement at all, and the decisions establish that there is no implied covenant on the part of North American to prosecute infringers.

So therefore, when the defendant says, "You cannot collect royalties from me because you have failed to prosecute infringers who are competing with me and I don't have to pay that royalty," then, our answer simply is that our bargain was not that we would prosecute [12] infringers: our bargain

was to the contrary; our bargain was that we would not be required to prosecute infringers; our bargain was that you were to get a non-exclusive license; our bargain was that your agreement in essence and the gist of the full consideration for your agreement is that we will promise you, as a non-exclusive licensee, as we promised others, that we, North American, the holder of the patent, will not sue you for infringement; you will have the right to use the process, you are protected against infringement claims if you use the process—and there is no minimum in here—if you use the process, you pay a royalty, but you with others we license will have that same royalty.

Further, the failure of North American, the alleged failure to prosecute infringers is not a defense.

The other point which is related and which I have covered I believe is that the agreement is not an exclusive agreement. There is no authority that I am aware of which holds that a non-exclusive licensee may defend an action on the contract for accruing royalties on the basis that others are permitted to use the patent, on the basis that others who are infringers have not been prosecuted, and certainly, as I have already disposed of it, on the ground of patent invalidity at least prior to the giving of a notice of repudiation. [13]

We have discussed the cases which were cited by the defendants in their brief; and I would ask the opportunity to discuss any points that they might raise in their reply.

The Court: All right. Mr. Jessup? [14]

(Argument on behalf of the Defendants and Cross-Claimants, by Mr. Jessup, not [14-A] transcribed.)

* * *

The Court: All right, Mr. Tuthill, do you want to reply?

Mr. Tuthill: Yes, your Honor.

I notice that these authorities contain, first of all, a half dozen or 8 or 10 cases dealing with matters apart from this question of declaratory judgment.

Now, this in effect then is an effort by the defendants to file a new brief which has already been answered by our reply brief. I must have the opportunity, of course, and ask for it, to submit a final memorandum. I would like to have this phase of the matter closed so far as submitting of authorities are concerned.

The Court: Well, this will be filed, Mr. Tuthill, but I will let you have five days to reply to this defendants' Supplemental Memorandum which was filed this morning. If for any reason you decide not to, would you write me a letter and send a copy to counsel?

Mr. Tuthill: I will be very glad to, your Honor.

The Court: All right, five days on this.

Mr. Tuthill: I will make my reply remarks very brief.

The Court: If you need any more time, you can have it. Then, if you decide not to, just write me a letter and send counsel a copy. After your remarks, we will take the matter as submitted, anyway.

Mr. Tithill: Thank you, your Honor. [15]

I will be very brief.

The thought occurs throughout defendants' argument that North American is adroitly maneuvering its program to cause detriment to a lot of people in this business; that they are taking one position at one time in this case and that before your Honor we are taking a different position. And furthermore, departures from the record which have been made are not supported by the pleadings here, for example, that at the initiation of this postforming process there were certain assurances made by North American to the effect that the industry or that the fabricators would be defended. Nothing of that sort is in issue here. There is no allegation in any part of the answer raising any defense of that character. So the effort by counsel to cast this controversy against a backdrop of that character is simply improper and out of order.

The Armstrong case, which was the only one quoted, we have discussed extensively. Any statement made in that case which supports the defendants' position is a gratuitous statement by the court. It is not even the decision of the three-Judge Court, your Honor. The decision was written by Justice McLucas. Do you remember him? [16]

The Court: Yes, I remember Judge McLucas.

Mr. Tuthill: He was sitting pro tem in the District Court. Justice Houser and Justice York were other members of that court. Justice McLucas wrote the opinion and after deciding the case he spent

three or four pages talking about something that supports the defendants here.

Justice Houser dissented. So it was a 2 to 1 case to start with, and then the unbelievable thing is this: That Justice York said in concurring, "I concur in the conclusion reached by reason of the first part of the opinion wherein it states that there is no further liability under the terms of the written contracts." So he was not even able to go along with Justice McLucas with respect to the material that the defendants here rely upon as establishing the law in California.

The result of that is that in this decision what they bring before your Honor is simply obiter dictum written by Judge McLucas in which he could not get the concurrence of the other two members of the court. Now, that, your Honor, in my judgment, and I lay that before you, is typical of the strength of the defendants' argument at this point in this case.

We have a simple action on contract. We have a [17] patent. The defendants are attempting to attack the patent, which they do not have the right to do. They are not remedyless. They have other remedies they can adopt, but we say they cannot bring that into this case.

The Court: All right.

Mr. Tuthill: We want this case a clean claim, action on contract, and we don't want to transfer this into a patent case.

The Court: We will mark it submitted. [18]

Certificate

I, Thomas B. Goodwill, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the arguments orally made by Arch R. Tuthill, Attorney for Plaintiff, North American Aviation, Inc., in case Nos. 20723-TC and 20724-TC, on April 8, 1957, in said court, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of May, A. D. 1957.

/s/ THOMAS B. GOODWILL,
Official Court Reporter.

[Endorsed]: Filed September 17, 1957. [19]

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT

Pursuant to Rule 33, Rules of Civil Procedure for the United States District Courts, plaintiff hereby propounds to defendant the following written interrogatories to be answered by an officer or agent of defendant:

Plaintiff hereby informs defendant that plaintiff has continued since January 1, 1957, to use, and

is now using, the same processes for postforming or treating phenolic sheet material as it used on and prior to September 30, 1956.

1. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., is infringing or is not infringing United States Patent No. 2,433,643? [41]

2. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., has ever infringed United States Patent No. 2,433,643?

3. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., is now using or is not now using the process patented under United States Patent No. 2,433,643?

4. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., has at any time since January 1, 1957, used the process patented in United States Patent No. 2,433,643?

HERZIG AND JESSUP,

By /s/ WARREN T. JESSUP,

Attorneys for Sani-Top, Inc.

Affidavit of service by mail attached.

[Endorsed]: Filed September 26, 1957. [42]

[Title of District Court and Cause.]

DEPOSITION UPON WRITTEN
INTERROGATORIES

Pursuant to Rule 31, Rules of Civil Procedure for the United States District Court, plaintiff

herein propounds the following written interrogatory to Arch R. Tuthill, Esq., counsel for defendant herein, to be answered under oath before Bernice B. Fry, Notary Public in and for the County of Los Angeles, State of California, or other Notary Public whose address is 458 South Spring Street, Los Angeles 13, California, on September 30, 1957.

1. On Monday, April 8, 1957, in presenting an argument before the Honorable Thurmond Clarke in case No. 20723-TC, entitled North American Aviation, Inc., vs. Sani-Top, Inc., you closed your argument by stating: [44]

“We have a simple action on contract. We have a patent. The defendants are attempting to attack the patent, which they do not have the right to do. They are not remedyless. They have other remedies they can adopt, but we say they cannot bring that into this case.”

What “other remedies” were you referring to when you made the above statement?

HERZIG AND JESSUP,

By /s/ WARREN T. JESSUP,

Attorneys for Sani-Top, Inc.

Affidavit of service by mail attached.

[Endorsed]: Filed September 26, 1957. [45]

[Title of District Cause and Cause.]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORY TO ARCH R. TUTHILL AND STATEMENT AND REASONS IN SUPPORT OF SUCH OBJECTIONS

Defendant objects to the written interrogatory propounded by plaintiff to Arch R. Tuthill on the grounds hereinafter stated. The interrogatory is:

"1. On Monday, April 8, 1957, in presenting an argument before the Honorable Thurmond Clarke in case No. 20723-TC, entitled North American Aviation, Inc., vs. Sani-Top, Inc., you closed your argument by stating:

" 'We have a simple action on contract. We have a patent. The defendants are attempting to attack the patent, which they do not have the right to do. They are not remedyless. They have other remedies they can adopt, but we say they cannot bring that into this case.'

" 'What 'other remedies' were you referring to when you made [69] the above statement?'"

Said interrogatory deals with immaterial and irrelevant matters; it calls for the opinion and conclusion of the witness; it is an improper effort to obtain the witness' expert testimony; the interrogatory calls for privileged matter prepared in connection with litigation; no showing is made of the rare situation having exceptional features which

would compel an attorney in the interests of justice to disclose material in his files or his mental processes with regard to this litigation.

The question deals with immaterial and irrelevant matters. As it appears in the quotation which is a part of the question, counsel was arguing the relevancy of certain defenses and pointing out that these defenses of patent invalidity were irrelevant and improper in an action for royalties on the license contract. Clearly the matter of the licensee's other remedies, if any, which were not then asserted was quite immaterial and irrelevant.

The question calls for the opinion and conclusion of the witness. This is self-evident and no argument is needed on this point.

The interrogatory deals with the work product of an attorney and public policy requires that such information cannot be inquired into unless the situation is a rare one with exceptional features which make the disclosure necessary in the interests of justice. Furthermore, if the party seeking such disclosure is able to obtain the information asked for elsewhere, he is not entitled to ask the question.

In *Hickman vs. Taylor*, 329 U.S. 495, 91 L. ed. 451, an attorney was charged with criminal contempt for his refusal to answer an interrogatory propounded by plaintiff with reference to oral and written statements of witnesses and other information secured in the course of preparation for possible litigation. The Supreme Court said: [70]

“Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. (Pg. 462.)

* * *

“But the general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. (Pg. 463.)

* * *

“When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.” (Pg. 464.)

See also *State of Maryland vs. Baltimore*, 7 F.R.D. 666 (District Court, Pennsylvania, 1947). In this

case defendant's interrogatories were directed to the plaintiff's attorney and asked for facts forming the basis for various allegations of negligence in the Complaint. Relying on the Hickman case, the Court said:

“* * * that the party asking for disclosure is [71] bound to show that the situation is a rare one having exceptional features which make the disclosure necessary in the interests of justice and (4) in ruling upon the precise point before it, the Court held that where it appears that the party seeking disclosure has obtained or is able to obtain the information asked for elsewhere, he has not met the burden. Applying this rule, which as stated epitomizes the opinion in Hickman vs. Taylor, supra, it appears that the defendant is not entitled to have the interrogatories answered.” (Pg. 667.)

The Court also said that the information requested could have been obtained elsewhere and for this reason the question was objectionable. Plaintiff's counsel are fully qualified to advise plaintiff of its legal remedies in this case.

Dated: September 30, 1957.

FLINT & MacKAY,

By /s/ ARCH R. TUTHILL,

Attorneys for Defendant.

[Endorsed]: Filed October 1, 1957. [72]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORIES TO DEFENDANT AND STATEMENT AND REASONS IN SUPPORT OF SUCH OBJECTIONS

Defendant objects to the written interrogatories propounded by plaintiff to defendant on the grounds hereinafter stated. The interrogatories are:

"Plaintiff hereby informs defendant that plaintiff has continued since January 1, 1957, to use, and is now using, the same processes for post forming or treating phenolic sheet material as it used on and prior to September 30, 1956.

"1. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., is infringing or is not infringing United States Patent No. 2,433,643?

"2. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., has ever infringed United States Patent No. 2,433,643?

"3. Is it the position of North American Aviation, Inc., [80] that Sani-Top, Inc., is now using or is not now using the process patented under United States Patent No. 2,433,643?

"4. Is it the position of North American Aviation, Inc., that Sani-Top, Inc., has at any time since January 1, 1957, used the process patented in United States Patent No. 2,433,643?"

Grounds of Objections

Each interrogatory deals with immaterial and irrelevant matters; each is based upon an assumed fact—of which defendant is informed after commencement of the action—that plaintiff is using the same post forming methods and processes that it employed while it was a licensee; each deals with matters occurring after commencement of the action; each calls for speculative and hypothetical answers based upon an irrelevant assumed fact occurring after the commencement of the action; each calls for the opinion and conclusion of the defendant, which is based upon an assumed fact occurring after the commencement of the action; each calls for the opinion and conclusion of the defendant as to what methods or processes the plaintiff is now or ever has used; each assumes that defendant knows what methods or processes the plaintiff has used in the past in its operations.

Moreover, each interrogatory is asked for the purpose of creating a cause of action when none existed at the time of the commencement of the action; defendant is under no duty whatever to answer questions of this character and thereby if it answers them in the affirmative create a cause of action in plaintiff's favor; the Court should not compel the defendant to answer these interrogatories and thereby if they are answered in the affirmative subject the defendant to litigation. [81]

Respectfully submitted,

FLINT & MacKAY,

By /s/ ARCH R. TUTHILL,
Attorneys for Defendant, North American Aviation, Inc.

[Endorsed]: Filed October 9, 1957. [85]

[Title of District Court and Cause.]

MINUTES OF THE COURT, OCT. 14, 1957

Present: Hon. Thurmond Clarke, District Judge.

Counsel for Plaintiff Warren Jessup, Esq.

Counsel for Defendant: Arch R. Tuthill,
Esq.

Proceedings:

Hearing on defendant's Motion for Court Order Striking Interrogatory Propounded by the Plaintiff and Excusing Attorney Arch Tuthill from answering same.

Also Hrg. Deft's Objections to Interrogs. Propounded by Plaintiffs.

Counsel argue.

"It is ordered that the objections to the interrogatory propounded to Attorney Arch Tuthill (filed October 1, 1957) are sustained, and the said attorney is excused from answering said interrogatory.

"It is further ordered that the matter of the interrogatories directed to the defendant North American Aviation Co., are to stand submitted until the motion of the defendants to dismiss is ruled upon.

Counsel notified."

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S
MOTION TO DISMISS

This cause having come before the court for hearing on defendant's motion, filed September 17, 1957, to dismiss under Fed. R. Civ. P. 12(b) (6) upon the ground that the complaint for declaratory relief fails to state a claim upon which relief can be granted; and the motion having been heard and submitted for decision as a motion for dismissal upon the ground of lack of jurisdiction over the subject matter under Fed. R. Civ. P. 12(b)(1) and 56(b); and it appearing to the court that:

(1) Plaintiff has failed to allege an actual controversy between the parties [28 U.S.C. § 2201];

(2) Therefore, this suit is not within the subject-matter jurisdiction of this court over "Cases * * * arising under * * * the Laws of the United States." [U. S. Const. Art. III, Sec. 2.]

Accordingly It Is Ordered that defendant's motion to dismiss is hereby granted.

It Is Further Ordered that this dismissal shall not constitute an adjudication upon the merits, and the judgment of dismissal shall so provide. [Fed. R. Civ. P. 41(b).]

It Is Further Ordered that defendant North American Aviation, Inc., shall lodge with the Clerk, within five days, [86] a judgment of dismissal to be settled under local rule 7.

It Is Further Ordered that the Clerk this day shall serve copies of this order by United States mail upon the attorneys for the parties appearing in this suit.

Dated November 25, 1957.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed November 25, 1957. [87]

In the District Court of the United States for the
Southern District of California. Central Division

No. 839-57 TC

SANI-TOP. INC., a Corporation,

Plaintiff,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Defendant.

JUDGMENT OF DISMISSAL

The Motion filed herein September 17, 1957, by defendant North American Aviation, Inc., a corporation, to Dismiss Complaint having duly and regularly come on before the Honorable Thurmond Clarke, United States District Judge, for hearing, and having been argued and submitted for decision, and it appearing to the Court and the Court finds

that the Complaint fails to allege an actual controversy between the parties and that this court lacks jurisdiction over the subject matter, and the Court having granted said Motion to Dismiss;

Now, Therefore, It Is Ordered and Adjudged:

(1) That the above-entitled action be and the same hereby is dismissed;

(2) That the aforesaid dismissal shall not constitute an adjudication upon the merits.

It Is Further Ordered, since said action is dismissed, that defendant be and it hereby is excused from answering plaintiff's Interrogatories to Defendant and that Defendant's Objections filed herein on October 9, 1957, to said Interrogatories be and the same are ordered off calendar.

/s/ THURMOND CLARKE,
United States District Judge.

Approved as to form.

FLINT & MacKAY,
By /s/ ARCH R. TUTHILL,
Attorneys for Defendant.

HERZIG & JESSUP,
By /s/ ALBERT M. HERZIG,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 2, 1957.

Entered December 3, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sani-Top, Inc., a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in this action on December 3, 1957.

Dated: Dec. 9, 1957.

HERZIG & JESSUP,

By /s/ ALBERT M. HERZIG,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 9, 1957. [88]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 92, inclusive, containing the original:

Complaint.

Defendant's Motion to Dismiss Complaint.

Affidavit of Arch R. Tuthill in Support of Defendant's Motion to Dismiss.

Statement of Reasons in Support of Defendant's Motion to Dismiss Complaint.

Interrogatories to Defendant.

Deposition Upon Written Interrogatories.

Plaintiff's Opposition to Motion to Dismiss.

Defendant's Objections to Plaintiff's Interrogatory to Arch R. Tuthill and Statement and Reasons in Support of Such Objections.

Defendant North American's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss.

Defendant's Objections to Plaintiff's Interrogatories to Defendant and Statement and Reasons in Support of Such Objections.

Order on Defendant's Motion to Dismiss.

Notice of Appeal.

Designation of Contents of Record on Appeal.

B. Reporter's transcript of proceedings had on April 8, 1957, attached to "Affidavit of Arch R. Tuthill in support of Defendant's Motion to Dismiss."

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: December 26, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 6, inclusive, containing the original:

Minute Order—October 14, 1957.

Judgment of Dismissal.

Defendant's Designation of Additional Portions of the Record to Be Included on Appeal.

Dated December 27, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 15831. United States Court of Appeals for the Ninth Circuit. Sani-Top, Inc., a Corporation, Appellant, vs. North American Aviation, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth District

No. 15831

SANI-TOP, INC., a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS TO BE PRINTED

The points on which the Appellant intends to rely in this appeal are as follows:

1. That the lower Court erred in dismissing the Complaint for declaratory relief.

2. That there exists a justiciable controversy entitling the plaintiff to declaratory relief on the question of whether Patent No. 2,433,643 is valid or infringed.

The following parts of the record, as filed in this Court, need to be printed by the Clerk for the hearing of this appeal: The entire Clerk's Transcript of Record from the U. S. District Court.

HERZIG & JESSUP,

By /s/ ALBERT M. HERZIG,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 2, 1958.

CORRECTED

No. 15831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANI-TOP, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

FLINT & MacKAY,
EDWARD L. COMPTON,
ARCH R. TUTHILL,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee.

FILED

MAY 28 1958

PAUL P. O'BRIEN, CLERK

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No. 15831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANI-TOP, INC., a corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

Appellee's Statement of the Case.

Appellant's statement is inaccurate¹ and presents a distorted version of the record.

¹On page 6 of Appellant's Opening Brief it is said, "defendant North American insisted upon inspecting the premises of plaintiff Sani-Top to determine exactly *what process plaintiff Sani-Top was practicing in January, 1958.*" (Italics appears in Appellant's Brief.) This statement is *not* correct; the motion and order granting the inspection particularly limited the inspection to one which was "exemplary of a postforming operation" during the period ending "September 30, 1956." (Order dated December 30, 1957, Denying Defendant's Motion for Stay of Action and Granting Plaintiff's Motion for Order Requiring Defendants to Allow Plaintiff to Inspect Defendants' Postforming Operation. Books and Records.) Also, this motion and order were made *after* the District Court granted the Motion to Dismiss.

The Herzig affidavit referred to on pages 3, 4, and 6 of Appellant's Opening Brief was filed on December 28, 1957, as a part of a Motion in this Circuit Court for Stay directed to the two contract cases. This was filed *after* the Motion to Dismiss was granted and was *not* before the District Court when it granted the Motion to Dismiss.

Three Cases Are Involved.

1. North American's action against Sani-Top, Inc., to recover royalties under the license contract. This is case No. 20723-TC, United States District Court, Southern District of California, Central Division.

2. North American's action against Bonded Products Co. to recover royalties under the license contract. This is case No. 20724-TC, United States District Court, Southern District of California, Central Division.

These two contract cases were filed on November 13, 1956, and were consolidated for trial. An interlocutory order, after trial, has now been filed, dated May 12, 1958, in favor of North American and against Sani-Top, Inc., and Bonded Products Co.

3. The instant appeal No. 15831. This is an appeal by Sani-Top, Inc., from an adverse judgment of dismissal of a declaratory relief action in which patent invalidity was alleged. The action below was commenced on July 9, 1957, by Sani-Top, Inc., against North American in the United States District Court, Southern District of California, Central Division, No. 83957-TC.

On December 28, 1957, under this same file number 15831, Sani-Top, Inc., filed a motion in this Circuit Court for a stay of the two royalty contract cases which were set for trial on January 14, 1958, in the District Court. This Circuit Court denied the motion, after argument, on January 8, 1958.

Chronology of the Three Cases.

| Date | N.A.A. v. Sani-Top, Inc. No. 20723-TC (Action to recover royalties) | N.A.A. v. Bonded Products Co., No. 20724-TC (Action to recover royalties) | Sani-Top v. N.A.A. No. 83957-TC 15831 Ninth Cir. (Declaratory Relief as to validity of patent) |
|------------|--|--|---|
| 0, 1951 | Non-exclusive license contract executed. | | |
| 27, 1953 | | Non-exclusive license contract executed. | |
| 0, 1956 | Third quarter 1956 ends. | Third quarter 1956 ends. | |
| 0, 1956 | Royalties for 3rd quarter 1956 payable. | Royalties for 3rd quarter 1956 payable. | |
| 2, 1956 | Sani-Top gives Notice of Termination as of Jan. 1, 1957; or repudiation on Oct. 22, 1956, if possible. | Bonded Products gives Notice of Termination as of Jan. 1, 1957; or repudiation on Oct. 22, 1956, if possible. | |
| 3, 1956 | Complaint for Royalties accrued to Sept. 30, 1956, filed. | Complaint for Royalties accrued to Sept. 30, 1956, filed. | |
| 0, 1956 | Answer filed. | Answer filed. | |
| 1, 1956 | Fourth quarter 1956 ends. | Fourth quarter 1956 ends. | |
| 1957 | License contract ends. | License contract ends. | |
| 0, 1957 | Royalties for fourth quarter 1956 payable. | Royalties for fourth quarter 1956 payable. | |
| 1957 | Motions to dismiss and to strike affirmative defenses and cross claims filed. | Motions to dismiss and to strike affirmative defenses and cross claims filed. | |
| n 27, 1957 | Defendant's Interrogatories filed. | Defendant's Interrogatories filed. | |
| 4, 1957 | NAA's Objections to Defendant's Interrogatories filed. | NAA's Objections to Defendant's Interrogatories filed. | |
| 3, 1957 | Court Argument of Motions to Strike and to Dismiss directed to affirmative defenses and cross claims alleging patent invalidity; also Objections to Interrogatories. | Court argument of Motions to Strike and to Dismiss directed to affirmative defenses and cross claims alleging patent invalidity; also Objections to Interrogatories. | |

| Date | N.A.A. v. Sani-Top, Inc. No. 20723-TC (Action to recover royalties) | N.A.A. v. Bonded Products Co., No. 20724-TC (Action to recover royalties) | Sani-Top v. N.A. No. 83957-TC 15831 Ninth Cir. (Declaratory Relief as to validity of patent) |
|----------------|--|--|---|
| May 14, 1957 | Order filed Granting Pltf's Motion to Strike portions of Deft's Answer and Cross Claim and Sustaining Objections to Certain Interrogatories. | Order filed Granting Pltf's Motion to Strike portions of Deft's Answer and Cross Claim and Sustaining Objections to Certain Interrogatories. | Complaint for declaratory relief filed. |
| July 9, 1957 | | | Motion to Dismiss complaint filed. |
| Sept. 17, 1957 | | | Pltf's Interrogatories to Defendant and to Tuthill filed. |
| Sept. 26, 1957 | | | Objections to Pltf's Interrogatories to Deft. and Tuthill filed. |
| Oct. 1, 1957 | | | Order Granting Motion to Dismiss. |
| Nov. 25, 1957 | | | Judgment of Dismissal filed. |
| Dec. 2, 1957 | | | Notice of Appeal filed. |
| Dec. 9, 1957 | Deft's Motion for Stay of Action filed. | Deft's Motion for Stay of Action filed. | |
| Dec. 12, 1957 | Pltf's Motion for Order for Inspection of Deft's operation, books and records filed. | Pltf's Motion for Order for Inspection of Deft's operation, books and records filed. | |
| Dec. 28, 1957 | | | Motion for Stay of Circuit cases filed in Circuit Court. |
| Dec. 30, 1957 | Order Denying Deft's Motion for Stay filed. | Order Denying Deft's Motion for Stay filed. | |
| Jan. 8, 1958 | | | Circuit Court denies Motion for Stay. |
| Jan. 14, 1958 | Trial commences. | Trial commences. | |
| April 21, 1958 | Submitted. | Submitted. | |
| May 12, 1958 | Order Referring Case to Special Master for Accounting (Decision in favor of Pltf.) | Order Referring Case to Special Master for Accounting (Decision in favor of Pltf.) | |

Background.

The background facts are simple. North American owns a process patent No. 2,433,643; it licensed—non-exclusive—appellant to use the process. Royalty was payable quarterly—twenty days after the end of each quarter. Appellant became delinquent in payments, and on November 13, 1956, two actions were filed to recover royalties which had accrued to September 30, 1956 and were payable on October 20, 1956.

Appellant—defendant in one of those contract actions—was attempting to evade payment of royalties, and on October 22, 1956, it delivered a dual purpose notice to North American: (1) an alleged notice of repudiation; and (2) a notice of termination as permitted by the license agreement, effective January 1, 1957.

Appellant answered the royalty suit alleging, in affirmative defenses and cross-claims, that the process patent was invalid. Motions to Strike and to Dismiss were filed against these affirmative defenses and cross-claims, on the grounds, principally, that a licensee was estopped to urge patent invalidity in a contract action brought to recover accrued and unpaid royalties. The District Court granted these motions after receiving extensive briefs and oral argument.

Several months *after* the District Court made its ruling, holding that defenses of alleged patent invalidity were improper in the contract cases to recover royalties, appellant filed a new action. In this case appellant sought declaratory relief, declaring the invalidity of North American's process patent. The alleged charge of infringement, which is essential to establish a justiciable controversy, consists of statements by North American counsel, made

in oral argument to the Court and in briefs, in support of North American's Motion to Dismiss and to Strike the affirmative defenses and cross-claims in the answers in the contract cases.

Appellant claims that *at the time* the declaratory relief complaint was filed it was "reasonably apprehensive that defendant North American took the position that Sani-Top's activities constituted an infringement of the Beach patent, since this demand for an accounting included an indefinite period beyond" September 30, 1956. (App. Br. p. 14.) This is a ridiculous assertion. The court argument on April 8, 1957, clearly demonstrated to appellant that North American was claiming royalties, and an accounting in connection therewith, in the contract cases only for the period ending September 30, 1956. The declaratory relief complaint was filed July 9, 1957—three months *after* this court argument.

The Complaint.

The Complaint attempts to allege a justiciable or actual controversy consisting of charges by North American that appellant is infringing the North American process patent. These charges of infringement, says the complaint, are "embodied, inter alia, in certain statements made on behalf of defendant by its counsel, A. R. Tuthill, Esquire; by certain averments made by defendant in a Complaint filed against the present Plaintiff on November 13, 1956, in the District Court of the United States for the Southern District of California, Central Division . . .; and by certain statements made by and on behalf of Defendant in a document filed in said litigation No. 20723-TC, entitled Plaintiff's Statement of Reasons and Memorandum of Points and Authorities in Support of Motions to Strike

and Dismiss. Details of the charge of patent infringement thus made by Defendant are set forth in the attached Affidavit of Warren T. Jessup." [Tr. 4-5.]

The Jessup Affidavit.

This affidavit [Tr. 9-12], is relied upon as the *only* basis for the allegation that North American, *prior* to the filing, on July 9, 1957, of the declaratory relief complaint, charged that appellant infringed the patent. The alleged charge of infringement is contained in certain statements by counsel during court arguments and in court pleadings, as follows:

(1) On April 8, 1957, Tuthill, attorney for North American, spoke, "in support of a certain Motion to Dismiss and to Strike" in the action "brought by North American Aviation, Inc., as plaintiff, against Sani-Top, Inc., as defendant, to collect alleged royalties due under a certain license agreement." [Tr. 9.]

During this argument Tuthill said of Sani-Top, Inc., and Bonded Products Co., another licensee,

"It is a fabricator of the material. It provides the raw material. It uses the process. It bends the material." [Tr. 10.]

And again,

"Now the Defendant is using the process continuously and is not paying royalties. We believe that an accounting is necessary to determine the exact amount owing." [Tr. 10.]

(2) The *prayer* in the Complaint which is quoted in the Jessup affidavit [Tr. 11] states as follows:

"That an accounting be ordered to accurately determine the amount of all laminated sheet material post-

formed by defendant under said Process since August 20, 1951, and the amount of royalties or license fees payable by defendant to plaintiff."

(3) The Jessup affidavit quotes from Plaintiff's Statement of Reasons and Memorandum of Points and Authorities in Support of Motions to Strike and Dismiss as follows:

"Obviously, at the date of defendant's purported rescission of the license agreement on October 22nd, 1956, plaintiff could, if it chose, have filed suit for infringement and the filing of such suit would, in law, constitute acquiescence in defendant's rescission. However, plaintiff chose to consider at that date and until January 1st, 1957, the license agreement still in force and, hence, in accordance with *United Mfg. Co. vs. Holwin*, supra, plaintiff sought its relief under the license agreement." [Tr. 11-12.]

The Tuthill Affidavit of September 17, 1957.

This affidavit [Tr. 13-30] incorporates the *full* transcript of Tuthill's argument to the District Court on April 8, 1957. A reading of the entire argument—of which selected excerpts were lifted out of context by the appellant—makes it clear that the royalty actions were concerned with the period ending September 30, 1956. Not quoted by the appellant, are the following statements by Tuthill:

"The amount of royalty that we seek to recover in this action is for the quarter ending on September 30, 1956, not that quarter alone but over the antecedent quarters, based upon an accounting to establish the full amount of royalty which is payable for the time ending September 30, 1956." [Tr. 20.]

* * * * *

“Therefore, all that we were entitled to recover under the Complaint as it was framed and filed was royalty payable during the period ending September 30, 1956. Those royalties were payable on October 20th.” [Tr. 20.]

* * * * *

“Now, as I say, there is a dispute in this case as to how these royalties are going to be calculated, but it is still a part of the action on the contract itself for the recovery of royalties.

“Now, the defendant is using the process continuously and is not paying royalties.

“We believe that an accounting is necessary to determine the exact amount owing.” [Tr. 22.]

“Remember, we are seeking to recover royalties in this case down to September 30th and not beyond that date.” [Tr. 23.]

* * * * *

“This, your Honor, is North American’s case on the contract for royalties to and including September 30th.” [Tr. 23.]

In Tuthill’s affidavit, filed as a part of the Motion to Dismiss and in answer to the affidavit of Jessup, Tuthill averred as follows:

“Several statements which I made during the course of this argument are referred to in the Affidavit of Warren T. Jessup dated July 9, 1957 filed in the above-entitled action, which said Affidavit is referred to in the Complaint therein in Paragraph (7) on pages 2 and 3.

“The argument to the court on April 8, 1957 and the memoranda of authorities then before the court all were directed to motion to dismiss and to strike cross-claims and counter claims interposed by the

defendants in the two cases (No. 20723-TC and No. 20724-TC) hereinabove referred to.

“The gist of the contentions advanced in behalf of North American Aviation, Inc., is that the complaints in those two actions sought to recover royalties under license agreements from their beginning dates to and including the quarter ending September 30, 1956 (See pages 5 and 6 of Transcript); the issues of patent invalidity were irrelevant to the action to the contract to recover royalties; that these alleged issues of patent invalidity were based on facts allegedly coming into existence subsequent to September 30, 1956, after which North American Aviation, Inc. did not seek to recover royalties; that for this reason, among others, the alleged issues of patent invalidity were irrelevant and the cross-claims and counter claims therefor were improper.

“The argument on April 8, 1957 and all statements made in connection therewith were directed therefore to a state of facts existing in the period during which North American Aviation, Inc., sought to recover royalties on and prior to September 30, 1956.

*“I categorically deny that I intended to state that subsequent to September 30, 1956, plaintiff herein was using the postforming process or that it was in any way infringing Patent No. 2,433,643.**

“In the answers by North American Aviation, Inc. to interrogatories in said referred-to cases (No. 20723-TC and 20724-TC), North American Aviation, Inc. made it clear that in those actions it sought to recover royalties to and including September 30, 1956; that it did not in those actions demand royalties or

*Emphasis is added throughout this Brief unless otherwise indicated.

an accounting for any period after January 1, 1957; that it did not charge that plaintiff herein had been using the process after January 1, 1957 as an infringer, in those actions.

“North American Aviation, Inc. did not in those cases, take any positions whatever with respect to whether the licensees were or were not obligated to pay royalties after September 30, 1956.

“In said two cases (Nos. 20723-TC and 20724-TC), an accounting is sought by North American Aviation, Inc. However, that accounting in those cases is sought for the period ending September 30, 1956. (See Transcript, pages 8-10.)”

Significantly, the Herzog affidavit has omitted an important sentence from Tuthill's quoted argument. Tuthill said:

“Now, the Defendant is a licensee, of this process. It is a fabricator of the material. It provides the raw material. It uses the process. It bends the material.” [Tr. 19.]

The beginning emphasized sentence of this series, was omitted by appellant. The significance of this omitted statement is that it clearly shows that Tuthill was discussing a state of facts existing at the time that appellant in fact was a licensee! During the entire argument Tuthill spoke primarily in the present tense. This was done naturally, since the argument was directed in its entirety to a state of facts which existed during the license period ending September 30, 1956, at which time Sani-Top *was* a licensee! As a matter of fact, appellant, at the time of this statement on April 8, 1957, was *not* a licensee;

this clearly appears from other portions of the argument.
[Tr. 23.]

Appellant has lifted another part of the argument out of its context. The argument states:

“3 (of the Motion to Strike) is directed to a part of the Second Affirmative Defense which alleges that the defendant is an infringer after October 22nd and that we must prosecute him on that basis. That we do not choose to do in this action. We may of course at a later date in another proceeding file an infringement case, but that is our choice and not the defendant’s choice.” [Tr. 24.]

The emphasized portion was not quoted by appellant. The omitted portion changes the entire sense and meaning of the statement which appellant quoted; clearly no threat of infringement is intimated here.

The brief filed by North American in support of the Motion to Strike and to Dismiss Directed to the Defenses in the answers based on alleged patent invalidity does not contain any threat of infringement. There [Tr. 11-12; Br. pp. 6-9] counsel was considering the legal sufficiency of a purported *unilateral* notice dated October 22, 1952, of repudiation or rescission of the license agreement; also, the remedies available to North American, *i.e.*, whether to accept the notice as a termination of the license, or, instead, to disregard it and treat the contract as still in force and sue for accrued royalties. [See Argument; Tr. 23-25.] No threat of infringement was even intimated here.

ARGUMENT.

The Motion to Dismiss the Declaratory Relief Complaint Was Considered by the District Court as a Motion for Dismissal for Lack of Jurisdiction and for Summary Judgment. Affidavits, as Well as Matters of Record in the Two Royalty Cases, Were Properly Considered by the District Court in Ruling on the Motion.

The District Court's Order on Defendant's Motion to Dismiss states:

"This cause having come before the court for hearing on defendant's motion, filed September 17, 1957, to dismiss under Fed. R. Civ. P. 12(b)(6) upon the ground that the complaint for declaratory relief fails to state a claim upon which relief can be granted; and the motion having been heard and submitted for decision as a motion for dismissal upon the ground of lack of jurisdiction over the subject matter under Fed. R. Civ. P. 12(b)(1) and 56(b); and it appearing to the court that:

"(1) Plaintiff has failed to allege an actual controversy between the parties (28 U. S. C. Sec. 2201);

"(2) Therefore, this suit is not within the subject-matter jurisdiction of this court over 'Cases * * * arising under * * * the Laws of the United States.' (U. S. Const. Art. III, Sec. 2.)

"Accordingly It Is Ordered that defendant's motion to dismiss is hereby granted." [Tr. 40.]

The Ninth Circuit has determined that affidavits may be used in ruling on a motion to dismiss; also, that as required by FRCP 12(b), a motion to dismiss, in which matters outside the pleadings are considered by the court, must be treated as a motion for summary judgment under

FRCP 56. (*Suckow Borax Mines v. Borax Consolidated* (9th Cir.), 185 F. 2d 196, 204-205 cert. den. 340 U. S. 943, reh. den. 341 U. S. 912; see also Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 1, pp. 604-618.)

Further, under FRCP 43(e), a motion which is based on facts not of record may be heard "on affidavits presented by the respective parties."

Affidavits may be considered by the court in ruling on a motion for summary judgment for the purpose of determining if there is a "genuine issue as to any material fact." (FRCP 56(e); *Suckow Borax Mines v. Borax Consolidated*, *supra*.) And, if these affidavits *specifically* show that a *general* contrary allegation in a pleading is untrue, then "no 'genuine' issue remains for the trier of the facts." (*Suckow Borax Mines v. Borax Consolidated*, *supra*.)

Also, in ruling on the motion the District Court is permitted to "take judicial notice of its own records in other related cases." (Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 3, p. 91.) Thus in *Ellis v. Cates* (4th Cir. 1949), 178 F. 2d 791, cert. den. 339 U. S. 964, reh. den. 340 U. S. 857), in ruling on motion for summary judgment in action for ejectment, the court properly "look(ed) to the record in the prior litigation." (793.) Also, in *Fletcher v. Evening Star* (Ct. App. D. C., 1942), 133 F. 2d 395, the court said, in ruling on a motion for summary judgment,

" . . . it is settled law that the court may take judicial notice of *other* cases including the same subject matter or questions of a related nature between the same parties." (395.)

The Record on This Appeal Is Not Complete. For This Reason the Judgment Should Be Affirmed.

“Every intendment should be in favor of the lower court’s judgment.” (*Hardt v. Kirkpatrick* (9th Cir. 1937), 91 F. 2d 875, cert. den. 303 U. S. 626, 82 L. Ed. 1088.) The court “cannot presume error. It must be made manifest. The presumption is the other way.” (*Clequot v. United States*, 70 U. S. 114, 141, 18 L. Ed. 116.) “It is elementary that appellate courts do not presume error, but grant relief only in cases where it is made *affirmatively* to appear that error has been committed.” (*Williamson v. Richardson* (9th Cir. 1913), 205 Fed. 245, 246.) “Doubts are to be resolved in favor of the judgment rather than against it.” (*Merryman v. Bourne*, 76 U. S. 592, 600, 19 L. Ed. 683.)

Moreover, it “is the appellant’s duty to bring up a record that discloses error.” (*Hardt v. Kirkpatrick*, *supra*.) And, error “will not be inferred from a doubtful statement in the record.” (*Fidelity & Deposit Co. v. Lindholm* (9th Cir. 1933), 66 F. 2d 56, 61.)

It also is to be presumed that “the District Court correctly decided all issues before it which might depend upon the factual evidence.” (*Heffron v. Western Loan and Building Co.* (9th Cir. 1936), 84 F. 2d 301, 305.)

“Since it is the appellant’s primary duty to submit a complete record, the presumption arising from the failure to make a proper showing must be one *unfavorable* to the contentions of the appellant.” (*Stepp v. McAdams* (9th Cir. 1937), 88 F. 2d 925, 928.) Also, if certain exhibits are not included, “the presumption is that the exhibits are not helpful to Appellant’s Cause.” (*Greco v. Haff* (9th Cir. 1933), 63 F. 2d 863, 864.)

The appellant has the burden, when fact questions are presented, of producing the *complete* reporter's transcript. "An appellant must include in the record all of the evidence on which the District Court might have based its findings. When this is not done, the judgment of the District Court must be affirmed." (*Watson v. Button* (9th Cir. 1956), 235 F. 2d 235, 238.)

In fact, in cases involving appeals from Orders, which would be justified by evidence taken or agreements made at a hearing, "the burden is upon the (appellant) . . . to include in the record on appeal a proper transcript of the hearing *to show that there was no such evidence or agreement.*" (*In re Chapman Coal Co.* (7th Cir. 1952), 196 F. 2d 779, 785.) If such is not done, the orders must be affirmed. (*In re Chapman Coal Co., supra.*) The *Chapman* case was affirmed by the 9th Circuit in *United States v. Vanegas*, 216 F. 2d 657.

In granting the motion—considered as a motion for summary judgment—the District Court "*impliedly* held that the pleadings, deposition, and admissions on file, together with the affidavits showed (1) that, with respect to the counterclaims, there was no genuine issue as to any material fact and (2) that appellee was entitled, as a matter of law, to a judgment dismissing the counterclaims." (*Walter W. Johnson Co. v. R. F. C.* (9th Cir. 1956), 230 F. 2d 479, 480-1.)

The following demonstrates the matters which were considered by the District Court in ruling on the Motion to Dismiss. This is the same court in which the two actions for royalties (20723-TC and 20724-TC) and the action for declaratory relief (83957-TC) were pending. All rulings in these three cases were made by the same District Judge.

1. In the Declaratory Relief case:
 - (a) The Complaint [Tr. 3-8].
 - (b) The Affidavit dated July 9, 1957, of Warren T. Jessup [Tr. 9-12].
 - (c) The Motion to Dismiss [Tr. 12-13].
 - (d) The Affidavit of Arch R. Tuthill dated September 17, 1957 [Tr. 13-16]; including the Partial Reporter's Transcript of Proceedings on April 8, 1957, in the consolidated District Court cases of North American Aviation, Inc., vs. Sani-Top, Inc., and Bonded Products Co. (20723-TC; 20724-TC) [Tr. 16-33].
 - * (e) Interrogatories to Defendant [Tr. 30-31].
 - (f) Defendant's Objections to Plaintiff's Interrogatories to Defendant [Tr. 37-39].
 - (g) Deposition Upon Written Interrogatories to Tuthill [Tr. 31-32].
 - * (h) Defendant's Objections to Plaintiff's Interrogatory to Tuthill [Tr. 33-36].
 - * (i) Statements of Reasons in Support of Motion to Dismiss and Objections to Interrogatories.
 - * (j) Plaintiff's Opposition to Motion to Dismiss.
 - * (k) Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss.
2. In the consolidated royalty cases—judicial notice, or by affidavit references:
 - * (a) The Complaints.
 - * (b) The Answers.
 - * (c) The Motions by North American to Dismiss and to Strike, directed to defenses of alleged patent invalidity in the Answers.

- *(d) North American's "Statement of Reasons and Memorandum of Points and Authorities in Support of Motions to Strike and Dismiss," filed Feb. 1, 1957.
- *(e) Answer to Plaintiff's Motion to Dismiss Counter-Claims and Motion to Strike Portions of Answer and Cross-Claim, filed Feb. 18, 1957.
- *(f) North American's "Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Dismiss Counter-Claims and Motions to Strike Portions of Answer and Cross-Claim," filed March 21, 1957.
- *(g) Supplemental Memorandum of Authorities filed April 8, 1957, by defendants.
- *(h) North American's "Answer to Defendant's Supplemental Memorandum" filed April 15, 1957.
- *(i) North American's "Answers to Certain of Defendants' Interrogatories" filed April 4, 1957.

The items marked * are *not* included as a part of the record on this appeal; they were, however, before the District Court in ruling on the motion to Dismiss.

The transcript of the Argument to the Court on April 8, 1957, of the Motion to Dismiss directed to the answer in the royalty cases, is *not* complete. The argument of counsel for the appellant (defendant there) is omitted! [Tr. 27.] And, North American's "Answers to Certain of Defendants' Interrogatories" (Item 2(i)) are omitted. Both of these were considered by the District Court in ruling on the Motion to Dismiss the Declaratory Relief Action—and *could* contain statements or evidence supporting the Judgment of Dismissal. Since appellant has not

produced a proper transcript "to show that there was no such evidence" the Judgment must be affirmed. (*United States v. Vanegas* (9th Cir. 1954), 216 F. 2d 657, 658.)

All of these omitted items were considered by the District Court in its implied finding that "there was no genuine issue as to any material fact and that appellee was entitled, as a matter of law to a judgment dismissing the complaint." (*Walter W. Johnson v. R. F. C.* (9th Cir. 1956), 230 F. 2d 479, 480-1.)

Obviously, any matters occurring subsequent to November 25, 1957—the date of the Order Granting the Motion to Dismiss the Declaratory Relief Complaint—were not before the District Court when the ruling was made. Such subsequent matters clearly have no bearing on the correctness of the District Court's ruling. Notwithstanding this obvious fact, appellant attempts to rely on its own inaccurate and incorrect (see p. 1, *supra*) version of the Motion and Order, on December 30, 1957, in the consolidated cases, for Inspection.

An Actual Case or Controversy Is Essential for Federal Jurisdiction of a Declaratory Relief Action.

The Federal Declaratory Judgment Act was adopted in 1934. It provides that in "a case of *actual* controversy" the Federal Court "*may*" entertain a declaratory relief suit. (28 U. S. C. A., Sec. 2201.)

In *Public Service Commission v. Wykoff*, 344 U. S. 237, 97 L. Ed. 291, the history and limits of the new remedy were discussed.

"In *Aetna Life Ins. Co. v. Haworth*, 300 US 227, 81 L ed 617, 57 S Ct 461, 108 ALR 1000, Mr. Chief Justice Hughes used the whole catalogue of familiar phrases to define and delimit the measure of this new

remedy. If its metes and bounds are not clearly marked, it is because his available verbal markers are themselves elastic, inconstant and imprecise. It applies, he points out, only to 'cases and controversies in the constitutional sense' of a nature 'consonant with the exercise of the judicial function' and 'appropriate for judicial determination.' Each must present a 'Justiciable controversy' as distinguished from 'a difference or dispute of a *hypothetical* or *abstract* character. . . . The controversy must be *definite* and *concrete*, touching the legal relations of parties having adverse legal interests. . . . It must be a *real* and *substantial* controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion *advising* what the law would be upon a hypothetical state of facts.' The relief is available only for a 'concrete case admitting of an immediate and definitive determination of the legal rights of the parties.' Id., at 240, 241.

* * * * *

"Such differences of opinion or conflicts of interest must be '*ripe for determination*' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." (Pp. 295-296.)

The 9th Circuit said, in *Garcia v. Brownell* (1956), 236 F. 2d 356:

"Unless an actual controversy exists, the District Court is without power to grant declaratory relief. *Mere possibility, even probability*, that a person may in the future be adversely affected by official acts not yet threatened does *not* create an '*actual* controversy'

which is a prerequisite created by the clear language of the statute if it be sought to maintain an action under Section 2201, Title 28 U.S.C.A.” (Pp. 357-358.)

“Continuing *apprehension* of appellant that some right might be violated, is *not* synonymous with continued existence of the controversy. . . .” (Pp. 359-360.)

Facts Must Be Alleged Showing the Existence of an Actual Controversy. Mere Apprehension of Infringement Litigation Is Not Sufficient.

The allegation—standing alone—that an actual controversy exists as to the validity and scope of a patent “. . . is a mere averment of a legal conclusion. It is not sufficient to support the jurisdiction of the court.” (*General Electric Co. v. Refrigeration Patents Corp.* (D. C. N. Y., 1946), 65 Fed. Supp. 75; see also *Ohio Casualty Company v. Marr* (10th Cir., 1938), 98 F. 2d 973.)

The distinguished author, Borchard, in his work on Declaratory Judgments, second edition 1941, states:

“*Justiciability, however, is hardly possible before the alleged infringer or his customers or dealers have been notified of the patentee’s claim, however informal the method of notification or change. The question has arisen whether such claim or notice or charge should be required, and whether it ought not to be possible, as in certain foreign countries, for a manufacturer, definitely contemplating making and selling a certain article, to bring an action against the owner of a possibly conflicting patent for a declaration that his contemplated article does not infringe. An early adjudication of such an issue might prevent much economic waste and useless expenditure of money.*

The patentee himself, desiring to enjoin an infringement, need give no advance notice that his patent even exists. And yet, *it seems best to limit declaratory relief for the infringer to cases in which an adversary claim has been made against him*, though it may, it is believed, apply to an article not yet manufactured but only about to be manufactured. *This requirement, present in practically all the adjudicated cases*, refutes the fear that patentees might be harassed by prospective infringers and be obliged continually to defend their patents. *In other words, the mere existence of the patent is not a cloud on title, enabling any apprehensive manufacturer to remove it by suit.* It requires an assertion of right under the patent to place the alleged infringer in gear to join issue and challenge the title."

This language by Borchard has been quoted in numerous cases. Decisions, hereafter discussed, support this distinguished author's conclusion that declaratory relief is limited "to cases in which an adversary claim has been made" and "the mere existence of the patent is not a cloud on title, enabling any apprehensive manufacturer to remove it by suit."

A Stated Threat by the Patentee of Suit for Infringement Is Required to Create an Actual Controversy. Such Does Not Exist in This Case.

In *Bliss v. Cold Metal* (D. C. Ohio, 1955), 137 Fed. Supp. 676, the court pointed out, in characterizing decisions in these situations, that "all of the cases cited and discovered turn upon a stated threat of suit for infringement." (678.)

And, appellant cannot conjure up an actual controversy by merely alleging that it is using the process—*i.e.*, that it is an infringer. Instead, affirmative threatening action by North American is required. Thus, in *National Hairdressers' v. Philad Co.* (D. C. Del., 1943), 3 F. R. D. 299 the plaintiff alleged that it was an infringer. The defendant, however, had never asserted that plaintiff was an infringer and had not threatened plaintiff with suit.

"It follows that National as a direct or contributory infringer cannot maintain on the pleading as now constituted an action under the Declaratory Judgments Act. (Citing authorities)" (200.)

A fortiori, the mere assertion by ^{Appellant}~~plaintiff~~ made *after* the filing of the declaratory relief complaint that it is using the same postforming process, that it used while licensed, falls far short of creating a justiciable dispute.

And, the complaint speaks as of the date of its filing—in this case July 9, 1957—and facts occurring *thereafter* cannot cure a defective complaint. (*Bonner v. Elizabeth Arden, Inc.* (2nd Cir., 1949), 177 F. 2d 703; *Kirk v. Culley*, 202 Cal. 501, 261 Pac. 994; *Walton v. County of Kern*, 39 Cal. App. 2d 32, 102 P. 2d 531; *Wiersma v. City of Long Beach*, 41 Cal. App. 2d 8, 106 P. 2d 45.)

Events occurring *after* the filing of the complaint for declaratory relief, which may establish actual controversy at such subsequent time, do not establish an actual controversy in existence at the time the antecedent declaratory relief case was filed.

Thus, an infringement complaint filed by the patentee *after* the filing of the Declaratory Relief complaint *cannot* establish a controversy at the time the antecedent Declaratory Relief action was filed. This was the hold-

ing in *Hart v. Recordgraph* (D. C. Del., 1947), 73 Fed. Supp. 146, where the court said,

“the contents of the New York complaint, *subsequently* filed, *cannot establish the existence of the controversy required in the Delaware complaint, antecedently* filed. A complaint must stand or fall upon its own merits and *its very foundational element of a controversy cannot be solely furnished by subsequent happenings.*” (149)

In *Hooper v. Langston* (D. C. N. J., 1944), 56 Fed. Supp. 577, in a declaratory relief action attacking a patent, *a subsequent infringement suit filed after the declaratory relief action was held to be irrelevant*, the court saying, “anything occurring subsequent to the filing of the complaint in the instant case cannot be considered, in this court.” (582)

In *Stevenson v. Stevenson* (7th Cir., 1957), 249 F. 2d 203, the court emphasized that the plaintiff “must show that there was a claim of adverse interest and the existence of a justiciable controversy *at the time that the complaint was filed.*” (205)

For the reasons announced in these cases the Interrogatories which were filed by appellant *after* the commencement of the declaratory relief action were irrelevant and improper. They were filed for the purpose of attempting to create a new cause of action where, in fact, none existed at the time the complaint for declaratory relief was filed.

Consistent with the foregoing is the established principle that “a plaintiff’s right to recovery depends upon his right at the inception of the suit and the non-existence of a cause of action when the suit is brought is a fatal defect which cannot be cured by the accrual of a cause of action pending suit.” (*Rohm v. Permutit Co.* (D. C. Del., 1953), 114 Fed. Supp. 846-848.)

General Contentions Between the Parties or Their Counsel Do Not Establish an Actual Controversy Within the Meaning of the Declaratory Judgment Act.

“General contentions between the parties which have not become a definite and concrete controversy will not suffice.” (*Chicago Pneumatic Tool Co. v. Hughes Tool Co.* (D. C. Del., 1945), 61 Fed. Supp. 767, 772, cert. den. 329 U. S. 781; and *Board of Commissioners v. Cockrell* (5th Cir., 1937), 91 F. 2d 412, 413.)

In *Research Electronics & Devices Co. v. Neptune Meter Co.* (D. C. N. Y., 1957), 156 Fed. Supp. 484, plaintiff filed suit for infringement of *three* of its patents. Defendant counterclaimed for a declaratory judgment declaring invalid certain *additional other* patents. Defendant claimed the actual controversy as to these *other* patents was established by a letter written to defendant by plaintiff's attorney, referring to these *other* patents. The attorney's letter stated, *inter alia*:

“In addition, there are a number of other patents and pending patent applications under the control of my client which may be infringed by equipment made or about to be made by you or your above mentioned subsidiary.

“This is to advise you that my client intends to firmly protect its patent rights against any and all infringements, and in their behalf I must request you to desist from further infringement on their patent rights and to account for past infringement.” (485)

The court held this letter was not “specific and *definite* enough so that it can be considered a threat sufficient to provoke a justiciable controversy.” (485) “If it had

been the *intention* to charge an infringement of all patents," the attorney would not have said "that other patents *may* be infringed." (485)

The court said, in striking the counterclaims:

"If we are to give meaning and effect to *all* the portions of the letter we must construe the reference to '*other patents*' as nothing more than an attempt to place the defendants on notice that some time in the future upon plaintiffs' further examination a subsequent charge may be lodged as to these patents. Cf. *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, supra, 61 F. Supp. at page 772. Such notice does not evidence a *present and existing controversy*. For the court to take jurisdiction in the instant case would mean that it might find itself passing upon moot and academic questions." (485-486)

A fortiori, on this appeal, *all* of the argument by North American's counsel must be considered; not merely isolated portions thereof, lifted out of context.

In *Tuthill v. Wilsey* (7th Cir., 1950), 182 F. 2d 1006, the dismissal of a complaint for declaratory relief alleging patent invalidity, was sustained. Wilsey sued Tuthill in a pending state court action to recover accrued royalties under a license agreement. In this state case Wilsey alleged Tuthill used the patent. Later Tuthill brought declaratory relief in the Federal Court against Wilsey. To sustain his allegation that Wilsey had charged Tuthill with infringement, Tuthill pointed to allegations by Wilsey in her pleadings in the State Court action in which she alleged that "pumps theretofore made and sold (by Tuthill) embodied the alleged patented inventions covered by the . . . patent." (1008)

The Federal Court, in ruling on the Motion to Dismiss inspected “the pleadings and exhibits . . . including the entire record in the state court proceeding up to that point (and) found that there was no justiciable case or controversy under the patent laws and therefore dismissed the action.” (1008)

The 7th Circuit affirmed—noting that the allegations in the pleading filed in the State action charging Tuthill with using the patented invention, were “much more easily construed as an assertion of permissive use relied upon by (Wilsey) to support her claim to the royalties provided for in the contract than as a charge of wrongful use or infringement.” (1008)

A fortiori, the statements by counsel for North American, which were directed to the issues in the contract actions to recover royalties, are to be “construed as an assertion of permissive use . . . to support (North American’s) claim to the royalties . . . (rather) than as a charge of wrongful use or infringement.” This was the construction adopted by the District Court—it is reasonable and it should be approved by this Circuit Court.

In *Hartford National B. & T. Co. v. Crowley & Co.* (3rd Cir., 1955), 219 F. 2d 568, a declaratory relief count was dismissed since the defendant’s statements did not create an actual controversy. Plaintiff charged that defendant’s similar product infringed certain of plaintiff’s patents; defendant, who also held a patent, replied defensively, stating, in effect, that its product did not infringe and that it was protected by the defendant’s own patent. Plaintiff contended that the effect of this statement was to charge that plaintiff’s product infringed defendant’s patent.

The Court pointed out that plaintiff “may fear that at some time in the future (defendant) *may* also think the products are identical and at that time *might* charge infringement.” (Emphasis by the Court.) However, says the Court, plaintiff’s “fears are merely conjectural. By no twist of logic or words can (defendant’s) alleged assertions alone be read to mean what (plaintiff) insists they mean.” (571.)

Thermo-Plastics Corporation v. International Pulverizing Corporation (D. C. N. J., 1941), 42 Fed. Supp. 408, involved an alleged controversy in which the defendant patentee talked to a third person. That person filed an affidavit, on motion for summary judgment, stating his “understanding” from the talk that if he continued to use a certain grinding mill “he would be subjected to an action for patent infringement.” This was denied in the patentee’s affidavit. The Court, granting the motion for summary judgment, emphasized that “no holder of a patent should be put to the expense of defending a suit by another person or sundry persons . . . unless such person is or may be damaged by *affirmative* acts of the patent holder.” (410.) Further, “investigation or inquiry (by a patentee) does not seem improper nor does it contain a threat of infringement.” (410.)

In *Stevenson v. Stevenson* (7th Cir., 1957), 249 F. 2d 203, plaintiff’s complaint for declaratory relief was dismissed. Plaintiff, owner of remainder interests in a trust, alleged that the life beneficiaries “claim an interest in the trust remainders” which has “cast a cloud on plaintiff’s title.”

To support the alleged adverse claim, an affidavit was filed by plaintiff's attorney stating that he was informed by the attorney for the mother of the life beneficiaries that the latter "were definitely making a claim against the remainder interest in the trusts through a Milwaukee lawyer by the name of Roger D. McIntyre." (207.) There was, however, no "proof of any claim made by defendants." (207.) Under these circumstances the Court said that "plaintiff will not be permitted to impose upon (the defendants) the defense of a lawsuit under color of a quiet title proceeding." (207-208.) Further, said the Court, "there is no actual controversy calling for a declaration of the rights of the parties under the Declaratory Judgment Act." (208.)

The Seventh Circuit cites, with approval, *Caterpillar Tractor Co. v. International Harvester Co.* (9th Cir.), 106 F. 2d 769, 772, in which the rule was announced that the declaratory judgment Act requires "an actual controversy as distinguished from a prayer for an opinion advising what the law would be upon a hypothetical state of facts"; and further, "that an actual controversy is *not* involved where a person merely apprehends or fears assertions of rights against him by another." (208.)

The Court, in the *Stevenson* case, concludes by stating:

"Simply stated, it is a general rule that where one person asserts a right and another is silent in regard thereto, there is no controversy." (208.)

In *Johnson v. Interstate Transit Lines* (10th Cir., 1947), 163 F. 2d 125, the dismissal of a declaratory relief complaint was affirmed. Plaintiff, a veteran, sought to

clarify his seniority status. The Court emphasized that to invoke this remedy "there must be no uncertainty that the loss will occur or that the asserted right will be invaded." (128-129.) To meet this requirement plaintiff relied upon a statement by defendant's counsel made at the argument of the motion, that:

"Business is falling off with the defendant and we are having more drivers on what is known as the extra board, men who can serve only part time; consequently the defendant may be seriously prejudiced by the delay."

This statement by counsel was not "sufficient to satisfy the requirement that the occurrence of the loss must be definite and certain." (129.)

Willing v. Chicago Auditorium, 277 U. S. 274, 72 L. Ed. 880, involved a statement by defendant to plaintiff that "his counsel had advised him that the lessee (plaintiff) had no right to tear down the auditorium building." This statement, which was not made as a threat, did not create a controversy, as to the plaintiff's right to tear down the building.

"The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so." (289-290.)

Tested by the foregoing decisions, it is clear that the statements made by counsel for North American in argument and brief cannot possibly be interpreted or construed to amount to a "stated threat of suit for infringement."

Appellant's Cases Are Not Controlling.

The facts in respect of "actual" controversy appearing in the decisions cited by appellant are completely different from those in this case. Hence, these decisions are not controlling. These cases are listed in the following table.

| Case | Defendant's (Patentee's) Acts Creating a Justiciable Controversy |
|--|--|
| <i>Caterpillar Tractor Co. v. International Harvester Co.</i> , (9th Cir., 1939), 106 F. 2d 769. | Defendant wrote plaintiff asserting that plaintiff's tractors "were infringements of a number of our patents" and requesting the discontinuance thereof and insisting upon "enforcement of our rights in the matter." |
| <i>Crowell v. Baker Oil Tools</i> , (9th Cir., 1944), 143 F. 2d 1003. | Defendant had previously filed suit against plaintiff charging him with infringement; also defendant had sued others for infringement. |
| <i>Technical Tape Corp. v. Minnesota Mining and Manufacturing Co.</i> , (2nd Cir., 1952), 200 F. 2d 876. | When negotiations for a license broke down, defendant warned plaintiff that if it made the product "it would face a highly expensive law suit." Defendant prosecuted other infringers successfully; also defendant had sued plaintiff for infringement of the same patent in another district. |

| <i>Case</i> | Defendant's (Patentee's) Acts Creating a Justiciable Controversy |
|---|---|
| <i>Dewey & Almy Chemical Co. v. American Anode</i> , (3rd Cir., 1943), 137 F. 2d 68. | Plaintiff sought a license and failed. Defendant sued an infringer who used the same "process" as plaintiff. The defendant publicly asserted "such a scope for its patent claims as to embrace" plaintiff's method, and that defendant "had to put a stop" to manufacturers infringement of the patent. |
| <i>Milkway Knitting Mills v. Sanson Hosiery Mills</i> , (D. C. Penn., 1952), 108 Fed. Supp. 5. | Plaintiff sued an infringer of its patent. Thereafter defendant licensed said infringer to make a stocking under defendant's patent. Also, defendant asserted publicly that stockings such as plaintiff's infringed defendant's patent. Also defendant in an infringement action obtained a court opinion that plaintiff's stocking "embodied 'the dominant motif' " of defendant's patent. |
| <i>Rhodes Pharmacal Co. v. Dolcin</i> , (D. C. N. Y., 1950), 91 Fed. Supp. 87. | Defendant wrote plaintiff and plaintiff's customers that defendant's patent had " 'broad generic' claims" and stated that one who "makes or uses" a product |

Defendant's (Patentee's)
Acts Creating a
Justiciable Controversy

Case

covered by the patent, infringes. Also, defendant threatened infringement action in trade journals.

Chicago Metallic Mfg. Co. v. Katzinger,
(7th Cir., 1941), 123 F. 2d
518.

After termination of a license agreement defendant demanded royalties from a *former licensee* "on account of the manufacture and sale" of a new product which defendant claimed was covered by the patent.

Lionel v. De Filipites,
(D. C. N. Y., 1936), 15
Fed. Supp. 19.

After termination of a license agreement, defendant patentee sued plaintiff in the state court for royalties on certain articles manufactured by plaintiff *after* the termination of the license.

National Transformer Corp. v. France Mfg. Co.,
(D. C. Ohio, 1952), 124
Fed. Supp. 503.

"Defendant made a claim that his patent was being infringed by notice to the present plaintiff's predecessor." The present plaintiff's product was the same as his predecessor.

Bliss v. Cold Metal Products Co.,
(D. C. Ohio, 1955), 137
Fed. Supp. 676.

Defendant *wrote plaintiff* a letter which asserted that the "use in this country of 4-high rolling mills *similar* to that shown in Exhibit B infringes" its patent and

| <i>Case</i> | Defendant's (Patentee's) Acts Creating a Justiciable Controversy |
|--|--|
| <i>Telechron v. Parissi</i> , (D. C. N. Y., 1951), 97 Fed. Supp. 355. | that "the manufacture and sale of such mills by Bliss constitutes contributory infringement of said patent." Defendant sued plaintiff in the state court for unjust enrichment based upon use of defendant's patent. Also defendant's counsel had written to plaintiff's representative stating that the latter's product "clearly infringes at least two patents." From this letter, the court said, it could be inferred "that the matter of infringement can not be settled except by further litigation." |
| <i>Florescent Fabrics, Inc. v. Ganter & Mattern Co.</i> , (D. C. S. D. Cal., 1950), 86 U. S. P. Q. 67 (not reported in F. 2d). | Although facts of the case are not in the opinion, as the existence of an actual controversy was not in issue, it appears that the defendant made statements to the trade that a certain "line of goods" manufactured by plaintiff infringed its patent. |

Altwater v. Freeman, 319 U. S. 359, 87 L. Ed. 1450, does not as appellants contend, decide "that the very

bringing of a suit on a license contract creates a justiciable controversy as to whether the patent is or is not infringed by the operations of the licensee or ex-licensee.” (App. Br. p. 16.)

This case is not controlling because:

1. A controversy had existed in fact for many years between plaintiff and defendant concerning the validity of plaintiff's patent and whether a similar article manufactured by defendant infringed the patent. This controversy resulted in an infringement action filed years before in which defendant's product was held to infringe and defendant was ordered by injunction to pay royalties to plaintiff (*Freeman v. Altvater* (8th Cir., 1933), 66 F. 2d 506).

2. Plaintiff's patent was subjected to infringement action by third parties with the result that twenty-three claims were declared invalid and three valid (*Premier Machine Co. v. Freeman* (1st Cir., 1936), 84 F. 2d 425).

3. Plaintiff surrendered the original patent and obtained two reissue patents, and demanded royalties from defendant on the claim that one of the reissue patents was covered by the license agreement. Defendant refused, claiming the license agreement had been terminated. Plaintiff then sued for royalties, an accounting and to *enjoin defendants from manufacturing the alleged patented product*. This action thus continued the long standing controversy concerning the plaintiff's patent.

Only one of the reissue patents was placed in issue by plaintiff; however, defendant counter claimed for declaratory relief adjudging that *both* reissue patents were invalid.

The Supreme Court held that defendant was entitled to this relief because of the long standing controversy which was "raging, even apart from the continued existence of the license agreement" (p. 364); also, because by this means defendant sought to be relieved from royalties required by the "compulsion of an injunction decree" and to "lift the heavy hand of threats and tribute" (364); also because the "dispute went *beyond* the single claim and the particular accused devices" (364) involved in the plaintiff's case; also because the royalties claimed were for a period *after* the termination of the license agreement.

Appellant cites the cases of *Clair v. Kaster* (2nd Cir., 1945), 148 F. 2d 644, and *Salem Engineering Co. v. National Supply Co.* (D. C. Penn., 1958), 75 Fed. Supp. 993, for the proposition that "if a manufacturer fears that he will be charged to infringe, he can always inquire of the patentee, and if the answer is unsatisfactory, he can bring an action for declaratory judgment." (App. Br. p. 14.) However, these cases do *not* decide this point.

Both cases involve actions for *infringement* commenced by the patentee. The defendants were *not* licensees. The issue was whether the patentees were barred by laches from the delay in filing suit after they made infringement threats to the defendants or their customers. The court held in both of these cases that "the defense of laches was without merit" and that a "patentee is not bound to assert his claims to their fullest extent by suing every conceivable infringer."

These cases are not in point since:

1. They are not actions by a manufacturer for declaratory relief. Instead, they are infringement suits brought by the patentees.

2. No issue was presented as to an “actual” or “justiciable” controversy.

3. No issue was presented as to whether inquiry by an apprehensive manufacturer of the patentee would require the patentee to answer or that the response would be sufficient to be the “stated threat of suit for infringement” which is necessary to support a declaratory relief action.

4. The quoted statement by the court (App. Br. p. 14) is pure *obiter* since the issue was not before the court.

5. The quoted statement by the Court (App. Br. p. 14) *assumes* that the patentee gives an “unsatisfactory” answer to the inquiring manufacturer. A reasonable assumption is that such “unsatisfactory” answer is a direct and intended threat of infringement action. If such is the court’s meaning, declaratory relief would be proper.

6. Appellees filed their Interrogatories *after*—not before—the declaratory relief action was filed. As hereinbefore demonstrated appellant cannot rely on such a belated inquiry—assuming (which it did not) it produced an “unsatisfactory” answer—to create a cause of action where none existed at the time the complaint was filed.

The District Court, in Its Lawful Discretion, Dismissed the Petition for Declaratory Relief. This Discretionary Ruling Should Not Be Disturbed on Appeal.

The Act “confers a *discretion* on the courts rather than an absolute right upon the litigant” (*Public Service Commission v. Wykoff*, 344 U. S. 237, 97 L. Ed. 291).

In *Garcia v. Brownell* (9th Cir., 1956), 236 F. 2d 356, 359, the court quoted from the case of *Eccles v. Peoples Bank*, 333 U. S. 426, 431, 92 L. Ed. 784 as follows:

“A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. (Citations.) It is always the duty of a court of equity to strike a proper balance between the *needs of the plaintiff* and the *consequences of giving the desired relief*.”

In *Cruz-Sanchez v. Robinson* (1957), 249 F. 2d 771, the Ninth Circuit recently said that “the grant or dismissal of a petition for declaratory judgment is within the discretion of the judge. Upon this ground there would be no basis for us to interfere with the adjudication of the District Court.” (774)

The District Court’s ruling was proper because the “needs of the plaintiff” do not require declaratory relief; also the “consequences of giving the desired relief” results in confusion and duplication of issues in the royalty contract cases.

In the first place no threat had been made by North American to prosecute appellant for infringement; neither had North American in any way interfered with appel-

lant's business operations. And "apprehension . . . that some right *might* be violated, is not synonymous with . . . controversy." (*Garcia v. Brownell* (9th Cir., 1956), 236 F. 2d 356, 359-360.)

In the next place, the issue of *scope* of patent was presented in the pending royalty contract cases. This same issue was pleaded in the declaratory relief complaint. The determination of that issue in the contract cases, if favorable to appellant, could free appellant from any possible claim of infringement. Thus, the present effort to obtain declaratory relief is clearly premature.

In the next place, appellant injected the issue of patent invalidity in its answer in the royalty contract case. While it is true that these defenses were stricken, nonetheless this ruling is subject to review on any appeal from the final judgment in that case. On such appeal this Ninth Circuit will determine whether the District Court correctly excluded the alleged patent invalidity as a defense to the contract claim for royalties. Under these circumstances, to permit the filing of a separate action for declaratory relief, alleging the identical patent invalidity, would result in confusion and duplication of issues and proceedings.

A comparable situation was presented to the Third Circuit in *Magee-Hale Park-O-Meter Co. v. Vehicular Parking Limited* (3rd Cir., 1950), 180 F. 2d 897. Here, a declaratory relief complaint seeking an adjudication of patent invalidity was filed during the pendency of an anti-trust case brought by the United States against the defendant patentee. The plaintiff had intervened in the antitrust case and moved for summary judgment, claiming patent invalidity; the District Court did not rule on this motion.

Thereafter, the plaintiff filed this declaratory relief action, dismissal of which was affirmed.

The Third Circuit could *not* “say that the Court below abused its discretion in dismissing the complaint.” (899) The fact that issues of patent invalidity and scope of patent were presented by plaintiff as the intervenor in the separate antitrust litigation was controlling. Proper procedure required that it be first determined in the antitrust case whether these issues could be completely litigated there, and that until such was determined by a final judgment, the filing of the separate declaratory relief action was inappropriate.

Conclusion.

The judgment should be affirmed, with costs.

Dated May 27, 1958.

Respectfully submitted,

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No. 15831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANI-TOP, INC., a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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No. 15831
IN THE
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SANI-TOP, INC., a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings and Facts.

This suit was opened in the District Court of the United States for the Southern District of California, Central Division, by the filing of a Complaint for Declaratory Relief [Tr. pp. 3-8], accompanied by a supporting Affidavit [Tr. pp. 9-12].

Original jurisdiction of the District Court is sustained by Title 28 U. S. C. Sections 1338(a) and 2201, reading as follows:

28 U. S. C. 1338. (a) "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

28 U. S. C. 2201. "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be viewable as such."

On defendant's motion and before trial, the District Court dismissed plaintiff's complaint for lack of jurisdiction, and it is from that dismissal that this appeal is taken. Therefore, virtually the entire record in this case will be relied on by plaintiff to establish that there is jurisdiction in the District Court, since that is the subject matter of this appeal. Primarily, those portions of the record which establish jurisdiction in the District Court are Transcript pages 3-5, and particularly paragraph 6 of the complaint; pages 9-12; pages 30-31; and page 42.

Statement of the Case.

Plaintiff filed a Complaint for Declaratory Relief [Tr. pp. 3-8], accompanied by a supporting Affidavit [Tr. pp. 9-12]. Defendant thereupon moved to dismiss on the ground that the District Court did not have jurisdiction because there did not exist an actual controversy between the parties [Tr. pp. 12-13]. After hearing argument, the District Court granted the motion and accordingly dismissed plaintiff's complaint [Tr. pp. 41-42]. Plaintiff thereupon filed this present appeal involving the proposition that an actual controversy did and does exist between the parties, and therefore the District Court did and does have jurisdiction of plaintiff's complaint.

Specification of Errors.

The District Court erred:

(1) In resolving, on defendant's Motion to Dismiss, that as a question of fact, an actual controversy does not exist between the parties such as to establish jurisdiction of this claim in the District Court [Tr. pp. 41-42].

(2) In dismissing plaintiff's complaint, on defendant's Motion to Dismiss [Tr. p. 42].

(3) In refusing to require defendant to state whether defendant charged plaintiff with infringement of patent No. 2,433,643 [Tr. pp. 37, 42].

ARGUMENT OF THE CASE.

1. History.

Defendant North American is the owner of patent No. 2,433,643 relating to a process for postforming laminated plastic sheets of the kind marketed, for example, under the trademark Formica [Tr. p. 4, and p. 1 of Herzig Affidavit accompanying Notice of Motion and Motion for Stay of Action].

This general type of process is being used by approximately 2,000 fabricating companies, so that defendant's patent may sit astride an entire industry, namely, the fabrication of plastic sink tops and the like [pp. 1 and 2 of Herzig Affidavit, cited above].

From time to time, since issuance of the patent in 1947, defendant North American granted several hundred licenses, largely to sink top manufacturers [p. 1 of Herzig Affidavit], all being in substantially the same form [as illustrated in Exhibit A referred to on page 1 of Supplementary Memorandum of Points and Authorities in Sup-

port of Motion for Stay]. Among these licensees was plaintiff Sani-Top [Tr. p. 10].

The general consensus of the postforming industry, both licensed and unlicensed, is that defendant's patent is invalid, having been anticipated by numerous other prior uses and sales, and that the patented process is so narrow in its scope that most of the industry does not use the patent [p. 2 of Herzig Affidavit].

Seeking advice of counsel for the first time, plaintiff Sani-Top, when advised that its process did not come within the patent and that the patent was invalid, repudiated the license on or about October 22, 1956, and refused to pay royalties [Tr. p. 10, p. 2 of Herzig Affidavit].

Defendant North American, on November 13, 1956, filed action against plaintiff Sani-Top, No. 20723, and against another licensee, Bonded Products Co., who had made a similar renunciation, this being Action No. 20724 [p. 3 of Herzig Affidavit]. The prayer of North American in action No. 20723 against Sani-Top was for royalties "since August 20, 1951" [p. 3 of Herzig Affidavit].

Sani-Top answered and included affirmative defenses and counterclaims, a copy being filed with this Court (page 2 of Supplementary Memorandum of Points and Authorities in Support of Motion For Stay). In response thereto, on January 31, 1957, North American moved to strike and dismiss, arguing *inter alia*:

"However plaintiff chose to consider at that date (October 22, 1956) and until January 1, 1957, the license agreement still in force . . ." (page 3 of the aforesaid Supplementary Memorandum, parenthetical material added).

In oral argument on the motion, on April 8, 1957, counsel for North American stated:

“It (Sani-Top) is a fabricator of the material. It provides the raw material. It uses the process. It bends the material.”

“Now the defendant (Sani-Top) is using the process continuously and is not paying royalties. We believe that an accounting is necessary to determine the exact amount owing.” [Tr. p. 10.]

Continuing the argument, Counsel for North American stated:

“We may of course at a later date in another proceeding, file an infringement case, but that is our (North American’s) choice and not the defendant’s (Sani-Top’s) choice.” [Tr. p. 24.] (Parenthetical material added.)

Based on this clear indication by North American that North American regarded Sani-Top’s current (April, 1957) activities as coming within the patent, the present complaint for declaratory relief was filed by Sani-Top on July 9, 1957.

Defendant North American moved to dismiss, and in the course of hearing on that motion, counsel for North American, attempting to construe the statements he made on April 8, 1957, stated:

“I categorically deny that I intended to state that subsequent to September 30, 1956, plaintiff herein was using the postforming process or that it was in any way infringing Patent No. 2,433,643.”

“North American Aviation, Inc. did not in those cases, take any positions whatever with respect to

whether the licensees were or were not obligated to pay royalties after September 30, 1956.” [Tr. p. 15.]

The District Court granted the Motion to Dismiss [Tr. pp. 40-42], whereupon this present appeal was taken.

Although defendant North American has studiously avoided making an unequivocal charge of infringement using the term “infringement”, the position taken and the statements made on behalf of North American have been such as to leave plaintiff Sani-Top with the indelible impression that North American regards the process presently being practiced by Sani-Top as an infringement of North American’s patent. It was on this reasonable apprehension by Sani-Top that the present action was filed in the District Court.

Notwithstanding North American’s delimiting of the scope of its license law suit, successively, first from an unlimited time, then cutting off at January 1, 1957, and finally cutting off at September 30, 1956, defendant North American insisted upon inspecting the premises of plaintiff Sani-Top to determine exactly *what process plaintiff Sani-Top was practicing in January 1958*. This inspection was ordered by the District Court over Sani-Top’s objections, and was duly carried out [page 4 of Affidavit of Albert M. Herzig, accompanying Notice of Motion and Motion For Stay of Action].

The principal issue of this appeal is whether a controversy exists between the parties such as to permit plaintiff to have a judicial declaration concerning whether plaintiff’s process infringes defendant’s patent and whether defendant’s patent is valid.

2. Preamble.

*Borchard*¹ points out that the problem of judicial declaratory judgments is worldwide, being found not only in the English common law but in practically all other judicial systems. In the United States it has found expression in state and federal statutes and in state and federal court decisions. In order to prevent courts from being burdened with mere academic or moot questions the statutes, both state and federal, require that there be an "actual controversy" before the court can act.

Some legal scholars have taken the position that declaratory judgment jurisdiction was inherent in our courts, both state and federal. This question became only of academic interest in 1934, insofar as federal courts are concerned, with the passage of the Declaratory Judgment Act.

The Act as applied to patents is summarized by *Borchard*¹ at page 803:

"Unfair Privilege of Patentee Before 1934:

"As the law stood prior to 1934, when the Federal Declaratory Judgment Act (FDJA) was passed, the patentee was the only one in a position to initiate a suit, usually an action for damages and an accounting, with or without an injunction, against the alleged infringer or his dealers."

In the 1941 *Tremond*² case the Third Court of Appeals discussed the scope of jurisdiction under the Act at considerable length.

¹*Borchard: Declaratory Judgments* (2d Ed.), 1941.

²*Tremond v. Schering Corp.* (C. C. A. 3, 1941), 122 F. 2d 702, 50 U. S. P. Q. 593.

In the *Federal*³ case the same court pointed out that inferences most favorable to the plaintiff must be taken on a motion to dismiss Declaratory Judgment Act complaint.

3. Ninth Circuit Decisions.

Within this Circuit there has been little occasion to inquire into the question raised in this Appeal. Only three cases have been found bearing on the specific question of the type of defendant's activity which gives rise to an actual controversy. All three cases have held that an actual controversy did exist.

The first is the *Caterpillar*⁴ case wherein defendant had charged infringement by "the track type tractors which you (plaintiff) have brought out." Plaintiff took the position that this included one of plaintiff's models in process of production but not yet on sale. The District Court agreed with defendant that plaintiff's new tractor could not be included in the Declaratory Judgment action, but the Appeal Court reversed, holding that a controversy existed as to the new model, as well as the old models.

In the *Crowell*⁵ case, defendant had once sued plaintiff for patent infringement but had subsequently dismissed without prejudice. Four years later plaintiff brought suit for declaratory judgment predicated on defendant's earlier patent infringement suit. The District Court dismissed plaintiff's complaint, but was reversed by this Appeal

³*Federal v. Associated* (C. C. A. 3, 1948), 169 F. 2d 1012, 78 U. S. P. Q. 1.

⁴*Caterpillar v. International* (C. C. A. 9, 1939), 106 F. 2d 769, 43 U. S. P. Q. 160.

⁵*Crowell v. Baker* (C. C. A. 9, 1944), 143 F. 2d 1003, 62 U. S. P. Q. 176.

Court which held that plaintiff was still under sufficient jeopardy to create an actual controversy under the act.

In the *Fluorescent*⁶ case the District Court (Judge Mathes) held:

“ . . . an ‘actual controversy’ is presented if the patent owner has made statements to the trade that his patent is being infringed by a line of goods whether or not the identity of the alleged infringer is known when the statements are made.”

4. Charge of Infringement.

In the present case, it appears that the District Court feels that relief cannot be granted in the absence of an express charge of infringement; but at the same time the Court has refused to require North American to affirm or renounce its position in this matter [Tr. pp. 30, 31, 42]. The cases clearly indicate that an express charge of infringement is not necessary to confer jurisdiction. An actual controversy exists if the patent owner has given even a general indication which reasonably causes a manufacturer to be apprehensive that his process is regarded by the patent owner as coming within the patent. In the *Technical*⁷ case the Second Circuit Appeal Court noted:

“Once the patentee has made some claim directly or indirectly, so that notice is given that it asserts that there is or will be an infringement, a justiciable controversy exists, entitling the alleged infringer to seek declaratory relief.”

⁶*Fluorescent v. Gantner* (D. C. Cal., 1950), ~~99 Fed. Supp. 800~~, 86 U. S. P. Q. 67.

⁷*Technical v. Minnesota* (C. A. 2, 1952), 200 F. 2d 876.

The Court thereupon reversed the District Court, which has dismissed the complaint on the ground that there was no justiciable controversy, because an actual charge of infringement had not been made.

In the *Dewey*⁸ case the defendant (patent owner) had previously brought a patent infringement suit against a third party who was using the same process that was being used by plaintiff. About the same time plaintiff and defendant had conducted certain negotiations looking toward the possibility of a license, but these negotiations terminated fruitlessly. Defendant had never charged plaintiff with infringement and in fact did not even know what process the plaintiff was using. Plaintiff's Complaint for Declaratory Judgment was dismissed by the District Court on the ground that defendant had never threatened to sue plaintiff and in fact never even knew that plaintiff was infringing until the institution of the suit. The Third Circuit Appeal Court reversed and remanded, holding that all of the facts indicated an actual controversy between the parties, and saying at page 70 of 137 F. 2d:

"In its suit against the Lee-Tex Company. Anode has asserted that the coagulant-dip process practiced by that company constitutes an infringement. It is not denied that Anode has thus publicly asserted such a scope for its patent claims as to embrace the similar methods practiced commercially by Dewey & Almy. We think this assertion evidences the existence of a substantial controversy between Anode and Dewey & Almy (parties manifestly having adverse legal interests), 'of sufficient immediacy and reality to want the issuance of a declaratory judgment.'

⁸*Dewey v. American* (C. C. A. 3, 1943), 137 F. 2d 68, 58 U. S. P. Q. 456.

“Certainly the fact that Anode had never made any direct threat to sue Dewey & Almy, is not conclusive of the problem. In *E. W. Bliss Co. v. Cold Metal Process Co.*, 102 F. 2d 105 . . . (C. C. A. 6th, 1939), an actual controversy was held to exist although it was evident *that the patentee was exerting every effort to avoid entanglement in litigation with the particular alleged infringer seeking the declaration.* . . .

“The fact that Anode did not learn until the present complaint was filed that Dewey & Almy was practicing the coagulant-dip process commercially, does not negative the existence of a case of actual controversy between them. If Anode had published a printed notice or circular asserting that use of the described coagulant-dip process constitutes an infringement of its patents this would undoubtedly mark the existence of an actual controversy between the patentee and all persons who engaged in practicing the process, whether they were known to the patentee or not.” (Emphasis added.)

Certiorari was denied. U. S. S. C. 1943, 64 S. Ct. 70; 320 U. S. 761; 59 U. S. P. Q. 495.

In the present case defendant has clearly and unmistakably taken the position, in the course of the license suit No. 20723, that plaintiff's activities come within the scope of the Beach patent [Tr. pp. 10-11]. In the language of the *Dewey*⁸ case, this undoubtedly marks “the existence of an actual controversy between the patentee and all persons who engage in practising the process”, *i.e.*, the process which North American has stated comes within the North American patent; although the defendant is “exerting

⁸*Dewey v. American, supra.*

every effort to avoid entanglement in litigation with the particular alleged infringer seeking a declaration” [Tr. p. 15].

In the *Millway*⁹ case the defendant had never charged plaintiff with patent infringement but had on numerous occasions taken the position that stockings exactly like those manufactured by plaintiff were within the scope of defendant’s patents. The District Court held that the conduct of the defendant created an actual controversy, saying:

“ . . . it is perfectly clear—in fact, it was *so stated by the defendant’s counsel at the argument of this motion*—that the defendant considers that the stocking made and sold by the plaintiff infringes the defendant’s patent, and it is the fact that the defendant has consistently maintained that position publicly, in court and out of court.” (Emphasis added.)

In the present situation counsel for defendant has stated in open court that the process used by plaintiff comes within the Beach patent [Tr. p. 10].

In the *Rhodes*¹⁰ case the court sustained its jurisdiction under the Act noting:

“The defendant apparently believes that it can avoid a court test of the validity of its patent, and the claim as to its scope made to the trade by withholding formal claim of infringement. This is not the law. Even a person who is about to engage in conduct which a patentee has *generally indicated* would constitute an infringement may bring a declaratory relief action

⁹*Millway v. Sanson* (D. C. Pa., 1952), 108 Fed. Supp. 5, 95 U. S. P. Q. 42.

¹⁰*Rhodes v. Dolcin* (D. C. N. Y., 1950), 91 Fed. Supp. 87, 86 U. S. P. Q. 148.

before he is damaged. See Borchard, *Declaratory Judgment* (2d ed.) page 807.” (Emphasis added; also citing *Dewey*⁸.)

5. Defendant's Evasion.

Borchard at page 42 points out the danger of allowing a patentee to circumvent the intent of the Act by refusing to make a formal charge of infringement.

“Thoughtful students have pointed out that the term ‘actual controversy’ may result in a limitation on the proper power of courts to remove clouds from legal relations, simply because the defendant or potential ‘contradictor’ declines to appear or to contest the petitioner’s assertion.”

Throughout this entire controversy defendant has circumspectly and studiously evaded the term “infringement” with respect to plaintiff’s activities. Counsel for defendant in his affidavit of September 17, 1957, stated:

“North American Aviation Inc. did not in those cases, take any position whatever with respect to whether the licensees were or were not obligated to pay royalties after September 30, 1956.” [Tr. p. 15.]

But this is not so. On November 13, 1956, after Sani-Top’s repudiation of the license, on October 22, 1956, in Complaint No. 20723, North American (defendant herein) demanded an accounting from Sani-Top (plaintiff herein) in the following language:

“That an accounting be ordered to accurately determine the amount of all laminated sheet material postformed by defendant under said Process since August 20th, 1951, and the amount of royalties or

⁸*Dewey v. American, supra.*

license fees payable by defendant to plaintiff.” [Tr. p. 11.]

It will be noted that this constitutes a demand for an accounting extending indefinitely into the future, which demand could be predicated only on the patent and not on the terminated license.

The court will note that in this demand of November 13, 1956, no limit is placed on the termination of the accounting, and the reasonable interpretation of this language is that North American is demanding an accounting from August 20, 1951, through November 13, 1956, and indefinitely beyond. Thus plaintiff Sani-Top was reasonably apprehensive that defendant North American took the position that Sani-Top's activities constituted an infringement of the Beach patent, since this demand for an accounting included an indefinite period beyond the license demand, which was later delimited by North American to end on September 30, 1956 [Tr. p. 15].

Faced with this untenable situation, plaintiff Sani-Top followed the suggestion of the Court in the *Clair*¹¹ and *Salem*¹² cases.

“ . . . if a manufacturer fears that he will be charged to infringe, he can always inquire of the patentee, and if the answer is unsatisfactory, he can bring an action for a declaratory judgment. The time has now passed when a patentee may sit by and refuse to show his hand.”

¹¹*Clair v. Kastar* (C. C. A. 2, 1945), 148 F. 2d 644, 65 U. S. P. Q. 143, cert. den. 326 U. S. 762, 90 L. Ed. 459, 66 S. Ct. 143.

¹²*Salem v. National* (D. C. Pa., 1948), 75 Fed. Supp. 993, 76 U. S. P. Q. 255.

Thereupon, by way of interrogatories, plaintiff Sani-Top asked defendant North American, *inter alia*:

“Is it the position of North American Aviation, Inc., that Sani-Top, Inc., is infringing or is not infringing United States Patent No. 2,433,643?” [Tr. pp. 30, 31.]

The defendant's answer was unsatisfactory, *i.e.*, defendant refused to answer [Tr. p. 37], and was sustained in this refusal by the District Court [Tr. p. 42].

This action for declaratory judgment therefore has proper antecedent.

North American's attitude in this matter has been clearly stated by its counsel:

“We may of course at a later date in another proceeding file an infringement case, but that is our choice and not the defendant's choice.” [Tr. p. 24.]

It is exactly just such a position that the Declaratory Judgment Act was designed to handle.

Having given many indications that Sani-Top's activities are regarded as coming under its Beach patent, defendant North American should not be permitted to allow this cloud to hover over plaintiff Sani-Top by circumspectly avoiding use of the word “infringement”. In view of this history, plaintiff Sani-Top is entitled to a categorical statement of position, which defendant North American has studiously refused [Tr. pp. 15, 37.]

In the *Dewey*⁸ case the Third Circuit Court of Appeals commented:

“Certainly the fact that Anode had never made any direct threat to sue Dewey & Almy, is not conclusive

⁸*Dewey v. American, supra.*

of the problem. In *E. W. Bliss Co. v. Cold Metal Process Co.*, 102 F. 2d 105 . . . (C. C. A. 6th, 1929), an actual controversy was held to exist, although it was evident *that the patentee was exerting every effort to avoid entanglement in litigation with the particular alleged infringer seeking the declaration. . . .*"

The reason for defendant's coyness is obvious. With the threat of its patent (which plaintiff believes to be invalid, defendant can make small manufacturers like the plaintiff build up potentially bankrupting liability without opportunity to test the validity of the patent. This is a threat which only the most courageous could countenance, and then at the risk of their very business lives. It is manifestly against public policy to allow scarecrow patents to dominate an industry in this manner.

6. The Contract Action Raises an Actual Controversy.

The very prosecution of a contract action after the termination of the contract raises a controversy between the parties as to the plaintiff's continuing operations identical with its operations during the period of the contract [Tr. pp. 10, 11, 30, 31].

The *Altwater*¹³ case shows that the very bringing of a suit on a license contract creates a justiciable controversy as to whether the patent is or is not infringed by the operations of the licensee or ex-licensee. In this case, Freeman (licensor) sued Altwater (licensee) for specific performance and an accounting under a license contract. Altwater counterclaimed for a declaration of non-in-

¹³*Altwater v. Freeman* (U. S. S. C., 1943), 319 U. S. 359, 87 L. Ed. 1450, 63 S. Ct. 1115, 57 U. S. P. Q. 285.

fringement and invalidity. The Court of Appeals for the 8th Circuit held that the counterclaims were moot (*Freeman v. Altvater* (C. C. A. 8th 1942), 129 F. 2d 494; 54 U. S. P. Q. 218).

The Supreme Court¹³ reversed this holding, noting:

“The requirements of case or controversy are of course no less strict under the Declaratory Judgment Act . . . than in case of other suits . . . But we are of the view that the issues raised by the present counterclaim were justiciable and that the controversy between the parties did not come to an end . . . on the dismissal of the bill for non-infringement, since their dispute went beyond the single claim and the particular accused devices involved in that suit.

“ . . .

“ . . . The fact that royalties were being paid did not make this a ‘difference or dispute of a hypothetical or abstract character,’ . . . A controversy was raging, even apart from the continued existence of the license agreement . . . Royalties were being demanded and royalties were being paid. But they were being paid under protest and under the compulsion of an injunction decree. It was to lift the heavy hand of that tribute from the business that the counterclaim was filed. Unless the injunction decree were modified, the only other course was to defy it, and to risk not only actual but treble damages in an infringement suit . . . It was the function of the Declaratory Relief Act to afford relief against such peril and insecurity . . .”

¹³*Altvater v. Freeman, supra.*

In the *Lionel*¹⁴ case the controversy was instituted by the defendant, by bringing suit against the plaintiff for royalties due under a license. The plaintiff had previously terminated the license. Thereafter plaintiff brought a declaratory judgment complaint seeking a declaration that plaintiffs "have a right to manufacture and sell the said articles" (the articles previously licensed) "without interference from the defendants and that the letters patent in question are invalid, . . ." The court held that it had jurisdiction to hear this question under the Act.

The *National*¹⁵ case involved, *inter alia*, a Declaratory Judgment Act claim. The defendant-patentee's Motion to Dismiss was denied, the court noting:

"Here we have a controversy which is definite and concrete, touching the legal relations of the parties having adverse legal interests. The patentee, Ranney, defendant, made a claim that his patent was being infringed by notice to the present plaintiff's predecessor. The fact that the present plaintiff may not be liable for alleged past infringement by its predecessor does not negative a present controversy since it is holding and selling the same device and may be liable for present and future infringement."

The applicability of the *National* case to the present situation is manifest. Sani-Top is continuing now to do exactly the same thing as it did in 1956, and the 1956 activities of Sani-Top have been categorically charged by North American in Suit No. 20723 to come within the Beach patent. Therefore, since Sani-Top is, in the lan-

¹⁴*Lionel v. DeFilipis* (D. C. N. Y., 1936), 15 Fed. Supp. 19, 28 U. S. P. Q. 369.

¹⁵*National v. France* (D. C. Ohio, 1952), 124 Fed. Supp. 503, 102 U. S. P. Q. 348.

guage of the Ohio Court, "holding and selling the same device and may be liable for present and future infringement", there is an actual controversy between Sani-Top and North American, which Sani-Top, in all justice, should be allowed to litigate under the Declaratory Judgment Act.

7. Defendant's Initial Demand Extended Beyond the Contract.

In Action No. 20723 North American modified its position as the litigation proceeded, that it regarded the contract claim as terminating on September 30, 1956 [Tr. p. 15]; yet in the initial complaint on November 13, 1956 an accounting was demanded "of all laminated sheet material postformed by defendant under said Process since August 20th, 1951 . . ." [Tr. p. 11.]

In the *Chicago*¹⁶ case, Katzinger had licensed Chicago under certain Katzinger patents. Chicago had refused to pay royalties on certain of its products and Katzinger had brought suits in State Court to collect royalties under the license contract.

Thereupon, Chicago brought suit against Katzinger in District Court under the Declaratory Judgment Act alleging that an actual justiciable controversy under Katzinger's patent existed by virtue of Katzinger's claim that certain of Chicago's products came within the patent.

The District Court dismissed the action for lack of a justiciable controversy. The Court of Appeals reversed and held that the circumstances created a justiciable controversy such that Chicago (plaintiff) was entitled to an adjudication as to whether its product infringed the

¹⁶*Chicago v. Katzinger* (C. C. A. 7, 1941), 123 F. 2d 518, 51 U. S. P. Q. 492.

patent and whether the patent was valid. The court stated that defendant's claim that plaintiff's product came within the licensed patent created an actual controversy between the parties.

The *Chicago* case is strikingly parallel to the present situation, where defendant North American has, in an earlier action (No. 20723), sued to collect royalties, alleging that the activity of plaintiff, Sani-Top, comes within the licensed patent. Sani-Top has not changed its process from a time before termination of the license to the present date, and is continuing to use the same method that constitutes the subject matter of the previously filed lawsuit (No. 20723) under the license agreement. Obviously, therefore, there exists a very real controversy as to whether Sani-Top's present process infringes North American's patent, and Sani-Top is entitled, under the Declaratory Judgment Act, to have this question measured against the patent laws of the United States, which require an investigation of the validity of the North American patent, because an invalid patent cannot be infringed.

As noted in the *Chicago*¹⁶ case:

"The principal question presented by the complaint in this case is the validity of the patents. That question could not be litigated in the state court case, consequently the parties are not able to procure a full and immediate adjudication of their rights. Prior to the passage of the Declaratory Judgment Act, no one had a right under the patent laws to initiate a suit for affirmative relief in the form of an adjudication that another's patent was invalid; now the alleged infringer may sue."

¹⁶*Chicago v. Katzinger, supra.*

In the earlier filed license contract action (No. 20723), the question of validity of the patent has been specifically ruled out of consideration. Therefore, Sani-Top, plaintiff herein, is entitled to an adjudication of that question in the present action.

North American's panicky retreat from its original position is not without significance. North American apparently recognized that its original position, seeking an accounting unlimited as to time, constituted a claim under the patent and not under the license. Thereupon, a retreat was made, and January 1, 1957, was selected as the cut-off date beyond which it did not demand an accounting [Tr. pp. 11-12; p. 3 of Supplementary Memorandum of Points and Authorities in Support of Motion For Stay].

Apprehensive still, North American later retreated again, and finally decided that September 30, 1956, was really the termination date beyond which an accounting was not sought [Tr. p. 15]. This was finally nailed down by North American's counsel on April 8, 1957, wherein he stated:

“Remember, we are seeking to recover royalties in this case down to September 30th and not beyond that date.” [Tr. p. 23.]

8. Dismissal Should Not Be Predicated on Question of Fact Raised by Conflicting Affidavits.

On April 8, 1957, counsel for defendant North American made the following statements [Tr. p. 10]:

“It is a fabricator of the material. It provides the raw material. It uses the process. It bends the material.

“ . . .

“Now the defendant is using the process continuously and is not paying royalties. We believe that

an accounting is necessary to determine the exact amount owing.”

Subsequently, North American’s counsel denied that he “intended” to say what he said:

“I categorically deny that I intended to state that subsequent to September 30, 1956, plaintiff herein was using the postforming process or that it was in any way infringing Patent No. 2,433,643.” [Tr. p. 15.]

However, the intention of North American or its counsel is immaterial; the important thing is whether the question has been so raised by North American or by its agents as to make plaintiff Sani-Top reasonably apprehensive that Sani-Top’s continuing activities were and are regarded by North American as coming within the Beach patent.

In the *Bliss*¹⁷ case, only “a cordial letter” was involved. The word “infringing” was not employed. The strongest term was a statement that the plaintiff’s mills were “similar” to the patented mills of the defendant-patentee. The court nonetheless held that a sufficient controversy existed to give jurisdiction under the Act, noting:

“That question having been raised by defendant (*perhaps unintentionally*), plaintiff should not be denied the right to a declaratory judgment by a mere play on words.” (Emphasis added.)

But if the intention of the speaker is material, then the District Court erred in resolving this question on conflicting affidavits [Tr. pp. 10, 15].

¹⁷*Bliss v. Cold Metal* (D. C. Ohio, 1955), 137 Fed. Supp. 676, 108 U. S. P. Q. 47.

Conflicts in affidavits in a Motion to Dismiss a Complaint will not support the Judgment of the District Court; plaintiff is entitled to a trial to determine any fact questions.

In the *Hart*¹⁸ case the District Court summarily dismissed plaintiff's complaint. The Appeal Court reversed and remanded, stating:

"It is well settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of *ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue*. An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint . . .

"It is also well settled that on a motion to dismiss the complaint must be viewed in the light most favorable to the plaintiff and that the complaint should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim; further, no matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."

Plaintiff Sani-Top has averred sufficient facts to establish a justiciable controversy [Tr. pp. 4-5], and is entitled to an opportunity to establish those facts.

¹⁸*Hart v. Recordgraph* (C. C. A. 3, 1948), 169 F. 2d 580, 78 U. S. P. Q. 310.

9. Arguments of Counsel Bind Defendant.

In the *Telechron*¹⁹ case the defendant attempted to “blunt the statements made” by defendant’s counsel concerning infringement.

“ . . . by asserting that the letter was merely the expression of his own opinion as distinguished from that of his client, and that, in fact, he had no authority to write such letter. It is to be noted, however, that there is no disclaimer of the letter under discussion on the part of Parissi. The letter was not expressly withdrawn as in the case of *Uniflow Mfg. Co. v. Iraq Corp.*, 88 U. S. P. Q. 52. Neither is there any affidavit by Parissi or statement made by him which would indicate that he himself does not claim infringement of his patents by the plaintiffs.”

In the present case it is to be noted that defendant North American has not disclaimed the unambiguous language of counsel, which language verbatim is admitted by defendant:

“It is a fabricator of the material . . . It uses the process . . . Now the defendant *is using* the process *continuously* and *is not* paying royalties.”
[Tr. p. 10.] (Emphasis added.)

Counsel’s attempt to construe this language as applicable only to events which took place *three months previously* is untenable. Every verb—every adverb—is in the *present tense*—“is using”—“continuously—is not”.

This statement of counsel has not been refuted or negatived in any way by defendant North American. Surely this statement, standing alone, is enough to place Sani-Top in apprehension of some subsequent suit for patent in-

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¹⁹*Telechron v. Parissi* (D. C. N. Y., 1951), 136 Fed. Supp. 355, 89 U. S. P. Q. 136.

fringement to be brought (if defendant would have its way) at defendant's pleasure.

In the *Millway*⁹ case the court noted:

“ . . . it was so stated by the defendant's counsel at the argument of this motion—that the defendant considers that the stocking made and sold by the plaintiff infringes the defendant's patent, . . .”
(Emphasis added.)

In the present situation *counsel for North American has stated in open court that the process used by Sani-Top comes within the North American patent*. Counsel now attempts to limit and construe his remark to a period prior to January 1, 1957; but even if this limitation be accepted, the fact remains that North American has taken and still does take the position that Sani-Top's process as practiced in 1956 comes within the Beach patent; and Sani-Top has not changed the character of its process since that time. Therefore, Sani-Top has a very real reason to believe that it is North American's position that the Beach patent is infringed by Sani-Top's current activity.

10. Summary.

A formal accusation using the term “infringement” is not necessary. Statements by representatives of North American clearly indicate that it is North American's opinion that the present activities of Sani-Top come within the North American patent. This is sufficient to create a justiciable controversy under the Act.

North American's evasion and refusal to allay Sani-Top's apprehension of a future infringement suit does not dispel the controversy, but rather emphasizes that a con-

⁹*Millway v. Sanson, supra.*

troverſy does exiſt. The Diſtrict Court's ſhielding of North American by not requiring Sani-Top's interrogatories to be answered poignantly ſtresses Sani-Top's need for the relief ſought in this complaint.

North American's ſucceſſive retreat in its demand for an accounting, firſt, from an unlimited time, thence, to a period terminating January 1, 1957, and finally to a period terminating September 30, 1956, evidences North American's recognition that it had, in fact, charged Sani-Top with a demand for an accounting under the patent and not under the license, which is tantamount to a claim of patent infringement.

Neither North American nor its counſel has ever denied or renounced counſel's charges regarding Sani-Top's activities. An attempt to conſtrue theſe charges fell far ſhort of meeting the iſſue. Counſel's ſtatement "We may of course at a later date, in another proceeding, file an infringement caſe, but that is our choice and not the defendant's choice" is precisely the attitude that the Declaratory Judgment Act was deſigned to ſpike.

11. Conclusion.

A review of the record from beginning to end leads to the inescapable conclusion that defendant North American regards the activities of plaintiff Sani-Top as coming within the process covered by North American's patent. This creates an actual controversy between the parties entitling plaintiff to a judicial declaration under the Declaratory Judgment Act.

Respectfully submitted,

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No. 15831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANI-TOP, INC., a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 15831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SANI-TOP, INC., a Corporation,

Appellant,

vs.

NORTH AMERICAN AVIATION, INC., a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

1. Introduction.

"3 (of the Motion to Strike) is directed to a part of the Second Affirmative Defense which alleges that the defendant is an infringer after October 22nd and that we must prosecute him on that basis. That we do not choose to do in this action. We may of course at a later date in another proceeding file an infringement case, but that is our choice and not the defendant's choice."

This statement was made by Mr. Tuthill on behalf of the patent owner North American and he referred to the activities of Sani-Top. This is not disputed by North American.

It is hard to conceive how a threat of a possible infringement suit could be more effectively worded. Based on this threat, coupled with other charges and claims made

on behalf of North American, Sani-Top brought this present declaratory relief suit, seeking clarification of its present and future operations as a manufacturer and member of the general public, who must otherwise continue in the constant fear of an infringement suit to be brought at the pleasure of North American. Meanwhile potential damages will build up until the patent expires in 1964.

Notwithstanding the peripheral obfuscations injected by appellee, appellant respectfully submits that the only material—and certainly the dominant—question here is whether an actual controversy under the patent laws exists between these parties.

2. Correction of Facts.

Certain statements made in appellee's brief are incorrect and the record and reporters will so show.

ERROR 1. On page 3 of appellee's brief, after date of November 13, 1956, there is chronicled:

“Complaint for Royalties accrued to Sept. 30, 1956 filed”.

This is incorrect. On November 13, 1956, the complaint filed by North American prayed:

“That an accounting be ordered to accurately determine the amount of all laminated sheet material post-formed by defendant under said Process since August 20, 1951, and the amount of royalties or license fees payable by defendant to plaintiff.” (Transcript page 11.)

ERROR 2. On page 31 of appellee's brief, the *Technical* case is analyzed with the statement:

“Also defendant had sued plaintiff for infringement of the same patent in another district.”

This is incorrect. Suit had not been filed by the defendant at the time of the filing of the complaint, and the majority of the Appeal Court apparently followed the District Court in not considering the later filed complaint. The existence of an actual controversy was found by the Appeal Court only on the statements made by the defendant-patentee, and not the filing of any infringement suit.

ERROR 3. On page 33 of appellee's brief, analyzing the *Lionel* case, appellee states that the state court suit was for royalties after termination of the license. This is not clear from the reported decision, and the language is equally susceptible of an interpretation that the state court suit was limited to a claim for royalties only during the existence of the license.

ERROR 4. On page 33 of appellee's brief, speaking of the *Bliss* case, appellee makes the following analysis:

"Defendant wrote plaintiff a letter which asserted that the 'use in this country of 4-high rolling mills similar to that shown in Exhibit B infringes' its patent . . .".

This is believed to be incorrect. The decision reports:

"It will be noted at once that the letter is a cordial one and that nowhere is a suit for patent infringement threatened in so many words."

ERROR 5. On pages 34 and 35 of appellee's brief, an attempt is made to distinguish the Supreme Court case of *Altwater v. Freeman*. In the discussion, the case of *Freeman v. Altwater*, 66 F. 2d 506, is referred to, with the statement that this was "an infringement action filed years before". This is incorrect. *Freeman v. Altwater* was a

contract action quite similar in its nature to the contract actions No. 20723 and No. 20724 which preceded the filing of this present declaratory judgment complaint.

3. The Contract Action.

Although the pleadings in contract No. 20723 constitute only one element of the total package evincing the patent controversy between these parties, they have appreciable significance and should be included in the court's consideration, along with the various statements made on behalf of North American which have been quoted in the Transcript and in the briefs.

North American very circumspectly and cautiously avoids taking any position at all regarding the period after September 30, 1956. North American has made it abundantly clear that the contract action No. 20723 covers the period only up to September 30, 1956. North American has disclaimed all claims *under the contract* for the period after September 30, 1956. Therefore the logical inference is that the claim made in the Nov. 13, 1956, Complaint (quoted under ERROR 1 above) must have included a claim under the patent and not under the contract, since the contract claim has been so emphatically limited to terminate on September 30, 1956.

4. Judicial Notice Not Employed.

Contrary to appellee's contention, there is nothing in the dismissal order of the District Court from which one may infer that the motion was treated as anything but a simple "motion for dismissal upon the ground of lack of jurisdiction", and this is exactly the preface which the Court gave to its dismissal order.

There is nothing in the judgment and order to indicate that the Court went outside of the record contained in this action. The court's order is set forth on page 40 of the transcript and states *inter alia*:

“ . . . the motion *having been heard and submitted for decision as a motion for dismissal upon the ground of lack of jurisdiction over the subject matter* under Fed. R. Civ. P. 12(b)(1) and 56(b); and it appearing to the court that: (1) Plaintiff *has failed to allege an actual controversy* between the parties, [28 USC (2201)]; (2) Therefore this suit is not within the subject matter jurisdiction of this court” (emphasis added).

Appellee's brief accuses appellant of presenting an incomplete record, stating that appellant should have made of record everything of which the District Court might conceivably have taken judicial notice in rendering its order on the motion to dismiss. This is an absurd position for appellee to take. From the tenor of the dismissal order, appellant could not glean the slightest intimation concerning what the District Court might have taken judicial notice of in rendering its decision that “Plaintiff has failed to allege an actual controversy between the parties”. The quantity of “facts” of which a trial court might take judicial notice is almost infinite (Wigmore on Evidence, 3d Ed., 1940, pp. 547-579). Absent some indication in the court order that judicial notice was taken of matters outside the record in this case, appellant had and has no way whatever of knowing what facts might or might not have influenced the District Court in rendering its dismissal order.

Furthermore:

“Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it.”

Wigmore on Evidence, 3d Ed., 1940, Sec. 2568.

Since there was neither a request for judicial notice by either party, nor an indication that the District Court did take judicial notice of any facts outside this record, appellant cannot be justly charged with failing to provide a complete record.

In taking the present appeal, the only obligation that appellant could reasonably be charged with is an obligation to present those facts and incidents which it relies on to establish that an actual controversy did and does exist between the parties. Once an actual controversy has been established, the jurisdiction of the Federal Court under 28 U. S. C. 2201 attaches, and other events cannot shake that jurisdiction. *Dasian's v. Switzer*, D. C. Ohio 1950, 95 Fed. Supp. 626, 88 U. S. P. Q. 211.

To establish jurisdiction it is only necessary for plaintiff to present to the court sufficient facts to show that a controversy exists. In *McCurrach v. Cheney*, D. C. N. Y. 1944, 61 U. S. P. Q. 515, the court refused to dismiss a patent declaratory judgment complaint, saying:

“If the defendant has announced the position attributed to it by some of the affidavits, then manifestly there exists a controversy sustaining jurisdiction for a declaratory judgment . . .”.

From the dismissal order (Transcript page 40), it would appear that the District Court was simply following the order of procedure outlined by the New York District

Court in *Telechron v. Parissi*, D. C. N. Y. 1951, 97 Fed. Supp. 355, 89 U. S. P. Q. 136. Therein the court stated:

“The court agrees with the plaintiff that defendant’s motion to dismiss must be based either upon the insufficiency of the complaint or upon a showing that in fact there is no claim by the defendant that the plaintiffs have infringed his patent.

“The question of the sufficiency of the complaint can be disposed of by the statement that it appears to be in the usual form; that it alleges the existence of an actual controversy; that it contains allegations to the effect that the defendant asserts ownership of three certain patents, and that the plaintiffs are engaged in the manufacture of clock-controlled switches which violate defendant’s rights in said patents, and that such patents are invalid for lack of invention, and in effect have not been infringed by plaintiffs . . .”.

The New York court then proceeded to the second question as to whether an actual controversy did in fact exist, and found from the facts that such a controversy did exist.

It is appellant’s position here that there was error on the part of the lower court in this last step. If the existence of an actual controversy be regarded as a question of fact, then the District Court erred in resolving that question of fact on motion to dismiss. If, on the other hand, it be regarded as a question of law, it is appellant’s position that the District Court drew an incorrect legal conclusion from the facts which were presented in support of jurisdiction.

5. An Actual Controversy Exists.

The interpretation of the *Aetna* case, cited indirectly on page 19 of appellee's brief, as applied to patent declaratory judgment matters, is given by the Third Circuit in *Dewey v. American*, C. C. A. 3, 1943, 137 F. 2d 68, 58 U. S. P. Q. 456. There the court stated:

"The statutory provision limiting declaratory judgments to 'cases of actual controversy' is no more than a recognition that the Federal judicial power extends only to 'cases' or 'controversies' in the constitutional sense. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-40 (1937). This constitutional requirement as applied to declaratory judgments is not interpreted in any narrow or technical sense. *Aetna Life Ins. Co. v. Haworth*, *supra*, *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270 (1941). There must be a concrete case touching the legal relations of the parties having adverse legal interests and susceptible 'of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged.' "

The court then went on to conclude that:

"It is not denied that Anode has thus publicly asserted such a scope for its patent claims as to embrace the similar methods practiced commercially by Dewey & Almy. We think this assertion evidences the existence of a substantial controversy between Anode and Dewey & Almy . . .".

6. A Categorical Threat of Infringement Suit Is Not Required.

Appellee's insistence on page 22 of its brief that: "A stated threat by the patentee of suit for infringement is required . . ." is not supported even by *Bliss v. Cold Metal*, D. C., O. 1955, 137 Fed. Supp. 676, cited by appellee. In that case it appears that no derivative or close equivalent of the word "infringe" was employed by the defendant, but the court held that the question of infringement had nonetheless been raised. "perhaps unintentionally", by the defendant-patentee.

On the question of actual controversy the court in *Bliss* stated the law to be:

"If the party bringing suit is apprehensive that continued use, manufacture or sale of a patented device or method might be cause for suit by the patentee, and said apprehension is fostered by the patentee—either directly or indirectly, then it is for that party the Declaratory Judgment Act was designed as a means of precipitating the issue of liability and thereby minimizing damages if liability is found. If that party no longer desired to use, manufacture or sell the patented device or method he would have little reason to clear the air of possible infringement in a declaratory judgment action. It is, then, sufficient to come within the pale of the Declaratory Judgment Act for the party bringing suit to allege the past, present use, manufacture or sale of the patented device or method and the intention to continue to do so."

See also *Newell v. Newton*, D. C. Del. 1950, 95 Fed. Supp. 355, 89 U. S. P. Q. 17.

Clair v. Kastar, C. C. A. 2, 1945, 148 F. 2d 644, 65 U. S. P. Q. 143, and *Salem v. National*, D. C. Penn. 1948, 75

Fed. Supp. 993, 76 U. S. P. Q. 255, were straight patent infringement suits. The language cited on page 14 of appellant's opening brief, however, is more than mere dictum, because in each case the point under consideration related to a defense of laches raised by the defendant (accused infringer). The court struck the laches defense because of the availability of the declaratory judgment remedy. Therefore in making the statements quoted in appellant's opening brief, each court had direct occasion to particularly examine the nature of the remedy available to the accused infringer under the Declaratory Judgment Act. Thus the court's stated analysis of the Act may not be dismissed as mere *obiter dictum*, because it had a direct bearing on the ultimate ruling of the courts, in the respective cases, concerning the laches defense.

7. Events After Filing.

Opinions are divided as to whether the equity court may, in order to determine whether an actual controversy exists between the parties, take into account events occurring after the filing of a declaratory judgment complaint.

The case of *Hart v. Recordgraph*, D. C. Del. 1957, 73 Fed. Supp. 146 cited by appellee in support of its position on this point, was reversed by the Third Circuit. This reversal, holding that the lower court had erred in dismissing the complaint, was cited in appellant's opening brief at page 23, being the case of *Hart v. Recordgraph*, C. C. A. 3, 1948, 169 F. 2d 580, 78 U. S. P. Q. 310. There is no indication in the appeal decision that the appeal court either rejected or approved the lower court's language concerning events occurring after filing of the complaint. In

any event, however, this language of the lower court becomes at best *obiter dictum*.

Hooper v. Langston, D. C. N. J. 1944, 56 Fed. Supp. 577, 63 U. S. P. Q. 165, cited on page 24 of appellee's brief:

In this case, also, the court indicated that it would not consider events occurring after the filing of the complaint. However, this statement became dictum when the court held in favor of the plaintiff, to the effect that an actual controversy did exist between the parties, and thereupon denied the defendant's motion to dismiss for lack of an actual controversy.

Rohm v. Permutit, D. C. Del. 1953, 114 Fed. Supp. 846, 99 U. S. P. Q. 311, cited on page 24 of Appellee's brief.

This case involved a simple infringement suit where no infringement had occurred before the filing of the original complaint. In affirming its dismissal of the infringement complaint, the trial court, on rehearing (*Rohm v. Permutit*, 104 U. S. P. Q. 286), implicitly recognized the broader scope and power of an equity court under the Declaratory Judgment Act, noting:

"The action is an infringement action and nothing more. *It is not an action for declaratory judgment.*"
(Emphasis added.)

The court thus specifically limited the effect of its holding to a simple infringement suit and expressly excluded therefrom a declaratory judgment suit.

It may be noted parenthetically that the plaintiff later refiled successfully. *Rohm v. Permutit*, 130 Fed. Supp. 260, 103 U. S. P. Q. 76.

It is belived that the broad equity powers implicit in the Declaratory Judgment Act are better implemented through the attitude expressed by Judge Clark of the Second Circuit in his concurring opinion in *Technical v. Minnesota*, 200 F. 2d 876, 95 U. S. P. Q. 406:

“I agree with the decision (that a controversy existed), but think it should rest also on the showing that an undoubted controversy developed after this action was brought. Whatever doubt as to the existence of a controversy there may have been originally has been entirely removed—if we can look at actualities. . . . Forcing plaintiff to start over will not add to or subtract from these facts; it will only cause judicial waste.” (Parenthetical material added.)

8. Appellee's Other Cases.

It appears that of the remaining 37 cases cited in appellee's brief, in support of its various contentions, only nine relate to patents.

Since the issue here is—what conduct by a patentee raises an actual controversy—it is felt that little guidance can be gleaned from non-patent cases. This reply brief will therefore close with a discussion of these patent cases.

General Electric v. Refrigeration, D. C. N. Y. 1946,
65 Fed. Supp. 75, 68 U. S. P. Q. 324.

In this case the plaintiff brought suit for declaratory judgment; defendant moved to dismiss for lack of actual controversy; *motion was denied*.

The court first states that an allegation of an actual controversy made in the complaint is not, standing alone, sufficient to support jurisdiction, since it is a mere legal

conclusion. The court then proceeds to examine the preliminary facts set before it.

“Whether there was any claim or notice of infringement, when considering the qualifying language of the defendant in his letter of June 20, 1945, in reference to an opinion of ‘the other methods’ is not free from all doubt. We believe that the admitted communications between the parties sustain the view that the defendant claimed and gave sufficient notice of the claim of infringement of claim 11 to sustain jurisdiction. . . . The letter of June 20, 1945, if given the effect claimed by defendant, *would enable the defendant to accomplish a purpose intended to be avoided by the Declaratory Judgment Act. It might sit back and take no action till (sic) the plaintiff had gone to much trouble and expense in making and putting its refrigerator on the market.* We think the proper time is now to meet the question of infringement or invalidity and that a real controversy within the intent of the Declaratory Judgment Act exists.” (Emphasis added.)

National v. Philad, D. C. Del. 1943, 3 F. R. D. 299, 58 P. Q. 465.

Here the holding was against the patentee and the motion to dismiss was denied. The language therefore appears to be *obiter dictum*.

Chicago v. Hughes, D. C. Del. 1945, 61 Fed. Supp. 767, 66 U. S. P. Q. 425.

In this case plaintiff’s allegation of actual controversy was bottomed on an infringement notice tendered by defendant years before. As stated by the court:

“Ten years ago and six years ago defendant stated that it considered devices then made by plaintiffs to infringe three of defendant’s patents.”

The court proceeded to state:

“The ten-year old infringement notice should rest in peace. The day for justiciable resurrection has long since passed.”

The court carefully distinguished over *Derwey v. American*, 137 F. 2d 68, by stating:

“The persuasive fact which compelled that decision, according to the opinion, was *the extraordinary licensing program which the patent holder was forcing on the industry*. The particular method of doing business prompted the court to observe, ‘The patentee has used its patents as an economic weapon against other alleged infringers who decline to take a license. In its suit against the Lee-Tex Co., Anode has asserted that the coagulant dip process practiced by that company constitutes an infringement. It is not denied that Anode has thus *publicly asserted such a scope for its patents as to embrace the similar methods practiced commercially by Derwey & Almy.* * * * It is a fair inference that Anode in bringing suit against the Lee-Tex Co. was counting on the in terrorem effect upon other manufacturers * * *.’”

It seems clear that the present situation is far more in keeping with the *Derwey* facts than with the *Chicago v. Hughes* facts.

Furthermore in the Ninth Circuit case of *Crowell v. Baker*, C. C. A. 9, 1944, 143 F. 2d 1003, 62 U. S. P. Q. 176, it was held that a lapse of four years following the filing and dismissal of an infringement suit by the defendant did not serve to dissipate the charge of infringement contained therein, so as to erase the existence of an actual controversy. In this connection it is to be noted that all

of the conduct of North American Which Sani-Top is relying on to sustain the existence of an actual controversy occurred within less than a year of the filing of the declaratory judgment complaint.

Research v. Neptune, D. C. N. Y. 1957, 156 Fed. Supp. 484, 115 U. S. P. Q. 327.

This was a declaratory judgment action in which the issue turned on whether a statement by defendant made to plaintiff that it had certain other patents which may be infringed by the plaintiff's products, constituted a sufficient charge to bring all of defendant's patents in this general area into the scope of a declaratory judgment action. The court held that the specific patents which had been referred to by the defendant in its correspondence with the plaintiff were properly made the subject of a declaratory judgment action, but that no other patents could be brought into the declaratory judgment suit, because their designation by the defendant had been too indefinite. This, coupled with the general reference "may be infringed" caused the court to reject the unnamed patents from the suit.

It would appear that this circuit leans somewhat in the other direction on the question of specificity of subject matter. In *Caterpillar v. International*, C. C. A. 9, 1939, 106 F. 2d 769, 43 U. S. P. Q. 160, there was involved the question of how specific a charge of infringement by the defendant had to be with relation to the products manufactured by the plaintiff. It was held therein that the plaintiff could introduce into a declaratory judgment suit not only products being made at the time of the defendant's letter, but also products in process of development but not yet on sale.

Tuthill v. Wilsey, C. A. 7, 1950, 182 F. 2d 1006,
86 U. S. P. Q. 230.

In this case there was pending in state court a contract action brought by Wilsey against Tuthill, and it appeared to the court that the contract was or might be still in force. That being the case, the court held that Tuthill's declaratory judgment action in Federal court was premature, since it could not properly be brought until it had been clearly determined that Tuthill was no longer a licensee. It was on this very ground that the court distinguished its own ruling in *Chicago v. Katzinger*, 123 F. 2d 518, 51 U. S. P. Q. 492, discussed in appellant's opening brief, page 19.

In the present instance, the fact situation is that of the *Chicago* case, not the *Tuthill* case, for it is clear, and agreed by both parties, that Sani-Top is no longer a licensee of North American.

Hartford v. Crowley, C. A. 3, 1955, 219 F. 2d 568,
104 U. S. P. Q. 254.

In this case the principal act of the patentee-defendant which was alleged to constitute the raising of an actual controversy, *i.e.*, a charge of infringement, was a statement by the patentee that its products were protected by its own patents and did not infringe the plaintiffs patents. The plaintiff attempted to link this statement into a charge of infringement by alleging that since its products were "similar" to those of the defendant, it followed automatically that the defendant-patentee was charging that its patents were infringed by the plaintiff's products.

This is clearly distinguishable from the present controversy, where North American has asserted that Sani-Top's activity (and this is the only activity in issue) comes within North American's patent.

Thermo-Plastics v. International, D. C. N. J. 1941,
42 Fed. Supp. 408, 52 U. S. P. Q. 56.

Here the principal averment to support actual controversy jurisdiction was an affidavit by one of plaintiff's customers referring to a discussion with an agent of the defendant-patentee:

" . . . the exact wording of which deponent does not recall, but which discussion resulted in an understanding by deponent that if he continued to operate said grinding mill leased from Thermo-Plastics Corporation he would be subjected to an action for patent infringement."

In rejecting this affidavit the court held:

"The answering affidavit of Mr. Scowe states that he cannot recall what was said, but he had an 'understanding' and from the conversation he 'understood'. Nothing in Mr. Scowe's affidavit is of testimonial value."

In the present situation actual verbatim language has been placed of record to establish the existence of an actual controversy. Appellant's case here does not rest merely on conclusions or "understandings" reached by appellant.

Magee v. Vehicular, C. A. 3, 1950, 180 F. 2d 897,
84 U. S. P. Q. 395.

In *Magee* the reason the declaratory judgment complaint was dismissed was because of the fact that the identical issues presented therein by the plaintiff, namely, infringement and validity, were then pending before the District Court in a companion action which had been brought by the United States against the defendant and in which the plaintiff had intervened. The court therefore dismissed

the declaratory judgment complaint as being, in effect, redundant, saying:

“Magee Hale has seen fit to try to test the validity of the patents in the suit at No. 259. We cannot say under all the circumstances that it is inappropriate for Magee Hale to remain as a party at No. 259 until it be granted or denied relief therein.”

In the present situation the issue of validity of North American's patent has been specifically ruled out of consideration in the corresponding contract action, and Sani-Top (plaintiff herein), has no other avenue in which to test this issue except in the present declaratory relief action.

9. Conclusion.

“That we do not choose to do *in this action*. We may of course *at a later date in another proceeding file an infringement case*, but that is our choice and not the defendant's choice.”

This epitomizes North American's attitude. Its expression is the very situation for which the Declaratory Judgment Act was designed, as relates to patent cases. This question having been so clearly raised by the patentee North American, Sani-Top is entitled to a determination of validity and infringement as to its continuing operations, and should not be required to operate indefinitely into the future, piling up possibly bankrupting damages.

Jurisdiction rests with the Federal Court and the dismissal of the District Court should be reversed.

Dated June 12, 1958.

Respectfully submitted,

HERZIG & JESSUP,

By WARREN T. JESSUP,

Attorneys for Appellant.

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No. 15832

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**THE ENGLANDER COMPANY, INC., AND INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, WAREHOUSE-
MEN'S LOCAL UNION No. 117, AFL-CIO, RESPOND-
ENTS**

**PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING**

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FILED

DEC 31 1958

PAUL P. O'BRIEN, CLERK

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15832

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE ENGLANDER COMPANY, INC., ET AL., RESPONDENTS

**PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING**

This petition for rehearing is addressed to that part of this Court's opinion which rejects the Board's finding that Englander "violated Section 8 (a) (2) and (1) of the Act by: Vice-President Sparrowk's referring of job applicants to the [Teamsters] on January 11, 1956, for the purpose of discussing membership in that organization and, as part of such referral, furnishing some applicants with the address of the [Teamsters]" (R. 87). This conduct, in the Board's view, was unlawful because it interfered with, restrained or coerced employees in their right to join, assist or bargain through representatives of their own choosing or refrain from doing so, in contravention of Section 8 (a) (1) of the Act, and because it constituted "support" to the Teamsters within the meaning of Section 8 (a) (2).

(1)

In rejecting the Board's finding on this phase of the case, the Court states that "The test is whether actual domination or coercion is shown." (Slip opinion, p. 13.) The Board did not find that Englander violated Section 8 (a) (2) by dominating the Teamsters but, rather, by contributing support to it. Moreover, in finding a violation of Section 8 (a) (1), it is settled that the proper test is not whether the statements actually had the effect of interfering with, restraining or coercing employees "but whether they reasonably might be found to tend to have any such effect." The *American National Bank of St. Paul v. N. L. R. B.*, 144 F. 2d 268, 271 (C. A. 8). No actual coercion need be shown. *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 48-49, 50-51; *N. L. R. B. v. Donnelly Garment Co.*, 330 U. S. 219, 231; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588. In the *Radio Officers* case, the Supreme Court, quoting with approval from its prior decision in *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 798, 800, stated (347 U. S. at 48-49):

* * * the statutory plan for an adversary proceeding "does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts * * *. An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to

the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration”.

Constraint and coercion are “subtle things” requiring “a high degree of introspective perception” and the Board may infer such constraint or coercion from the evidential facts. *Donnelly Garment, supra*, 330 U. S. at 231; *Radio Officers, supra*, 347 U. S. at 50. And as stated by the Supreme Court in *Link-Belt, supra*, 311 U. S. at 588:

It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred ~~with~~ that the employees did not have that complete and unfettered freedom of choice which the Act contemplates.

Upon the undisputed evidence and evidence which, though disputed, was accepted by this Court, the Board, we believe, was clearly warranted in finding that Englander violated the statute by referring applicants for employment to the Teamsters Union.

It is undisputed that the employees of Craftmaster, whose plant Englander subsequently leased, were represented by three unions in three separate units.

Those who worked in the upholstery department were members of, and were represented by, the Upholsterers Union (R. 198). The truck drivers were members of, and were represented by, a local of the Teamsters (R. 156-157). The mill room employees and all other production and maintenance employees were members of, and had been represented by, the Furniture Workers Union since 1936 (R. 151-152, 157, 178-179). Each of these unions had a collective bargaining contract with Craftmaster covering the employees in the unit represented by it (R. 155-157). It is also undisputed that Englander, prior to leasing Craftmasters' plant, knew of the representation of these employees by these three unions and of their respective contracts with Craftmaster (R. 117-118, 289-291, 323). Englander, moreover, contemplated hiring Craftmaster employees to operate its own similar business (R. 289).

On January 11, 1956, before Englander had actually leased the plant from Craftmaster, but at a time when it was expecting to start operations on January 16 (R. 129-130), Vice-president Sparrowk talked to 15 or 20 persons who were seeking employment, most, if not all, of whose employment had been terminated by Craftmaster on the preceding day (R. 122). According to applicant Walters, a witness called by Englander and credited in this respect by the Board, "He [Sparrowk] just gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 345-346). According to Sparrowk's own testimony, he told the applicants that he had been in-

formed by the Teamsters that they expected to represent the employees in this plant; that he gave the applicants the name and address of the local Teamster representative and "told them to acquaint themselves with the fact * * * that they could get these facts from Mr. Williams of the [Teamsters] Local No. 117", and "to go and get the information as to what [the Teamsters] could do for them" (R. 124-125, 129). Sparrowk also testified that he told the applicants, "we didn't want any problems with anybody's union, that whoever could show us that they had the majority of the people represented by their union would be the people that we would do business with" (R. 128).

The Board and Trial Examiner found that, in view of Sparrowk's awareness of the applicants' membership in the Upholsterers or Furniture Workers Unions, the fact that none of them had expressed to Sparrowk any dissatisfaction with their respective unions, the fact that Sparrowk injected a subject into the interviews which had no relevancy to the purpose for which the applicants had come to see him, and the fact that these individuals were dependent upon his approval for an opportunity to resume their employment at the plant, "it would be only natural for the job applicants, as it is evident some of them, at least, did, to construe Sparrowk's ungermane and unsolicited proposal that they go to the Teamsters Local to discuss applications for membership in that organization, as meaning that Englander preferred the Teamster Local over the other unions, and that clearance by, or membership in, the Teamsters Local was

to be a condition of employment at the plant'' (R. 48-49).

Since, as the Board found, Sparrowk's statements were thus coercive in their nature, they are sufficient to support a finding that Englander unlawfully supported the Teamsters, in violation of Section 8 (a) (2), and interfered with, restrained or coerced employees in violation of Section 8 (a) (1) of the Act, without a showing that such statements actually had a coercive effect upon any employee, (See *Radio Officers Union* and other cases cited *supra*.) However, the reaction of the employees and their unions, following the interviews, shows that the employees in fact considered the statements to be coercive.

Immediately following his interview with Sparrowk, applicant Walters reported to the Teamster representative and joined the Teamsters Union (R. 345). The other applicants—or at least some of them—instead of seeing the Teamster representative, notified their own unions of what Sparrowk had told them (R. 198, 121-122). Thereupon the Upholsters Union, after first obtaining authorization from its International, set up a picket line at the plant (R. 198-199). On the following day, or on January 13, the Furniture Workers also set up a picket line (R. 183). Also, as a result of Sparrowk's conduct, both the Upholsterers and Furniture Workers Unions on January 12 filed charges with the Board, alleging that Englander had engaged in unfair labor practices (R. 9). Soon thereafter, on February 3, Furniture Worker Representative Truman offered to withdraw the picket line providing Sparrowk would hire those

of Craftmaster's former millroom employees whom Sparrowk wanted to hire and agree to a Board conducted election to settle the employees' bargaining rights (R. 157). Sparrowk, however, rejected this proposal on the ground that he was "under an agreement with the Teamsters" (R. 157). Englander, instead of starting production on January 16—the date Sparrowk had told applicants he hoped to start production—kept postponing the starting date until about a month later when the Upholsterers and Furniture Workers Union capitulated to the Teamsters, advised their members to join the Teamsters, and then proceeded to process the unfair labor practice charges which they had filed.¹

The Board, accordingly, respectfully requests the Court to grant this petition for rehearing and, upon reconsideration, to reverse its prior holding that Englander did not violate Section 8 (a) (1) and (2) of the Act by referring applicants to the Teamsters Union in the circumstances here shown. In any event,

¹ Furniture Workers Representative Truman testified that in calling off the picket line and advising members of his Union to join the Teamsters, he told them that "to further maintain the picket line with the plant open would jeopardize their unemployment compensation, that if going to work at Englander entailed having to sign anything that the Teamsters put in front of them, to go ahead and sign it, that we were going to further process the case, we felt that we would be better off with our members inside the plant than out" (R. 173, 174-175). Upholsterers Representative Royer, on the other hand, told members of his Union that the International of that Union had made a deal with the Teamsters whereby Upholsterer members were to work under the Teamsters jurisdiction (R. 202-203). Royer thereafter testified in support of the unfair labor practice charges which his Union had filed.

we respectfully suggest that the Court delete from its opinion (slip opinion, p. 13) the statement, "The test is whether actual domination or coercion is shown," since, as we have shown, the law is settled to the contrary.

JEROME D. FENTON,
General Counsel,
 THOMAS J. McDERMOTT,
Associate General Counsel,
 MARCEL MALLET-PREVOST,
Assistant General Counsel,
 FANNIE M. BOYLS,
Attorney,
National Labor Relations Board.

WASHINGTON 25, D. C., December²⁹ 1958.

CERTIFICATE OF COUNSEL

Comes now Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition; that said petition is, in his judgment, well founded and it is filed in good faith and not for purposes of delay.

MARCEL MALLET-PREVOST,
National Labor Relations Board.

WASHINGTON, D. C., December²⁹ 1958.

No. 15832 ✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE ENGLANDER COMPANY, INC., and
WAREHOUSEMEN'S UNION LOCAL 117,
affiliated with the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and
Helpers of America, Respondents.

ENGLANDER COMPANY, INC., Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

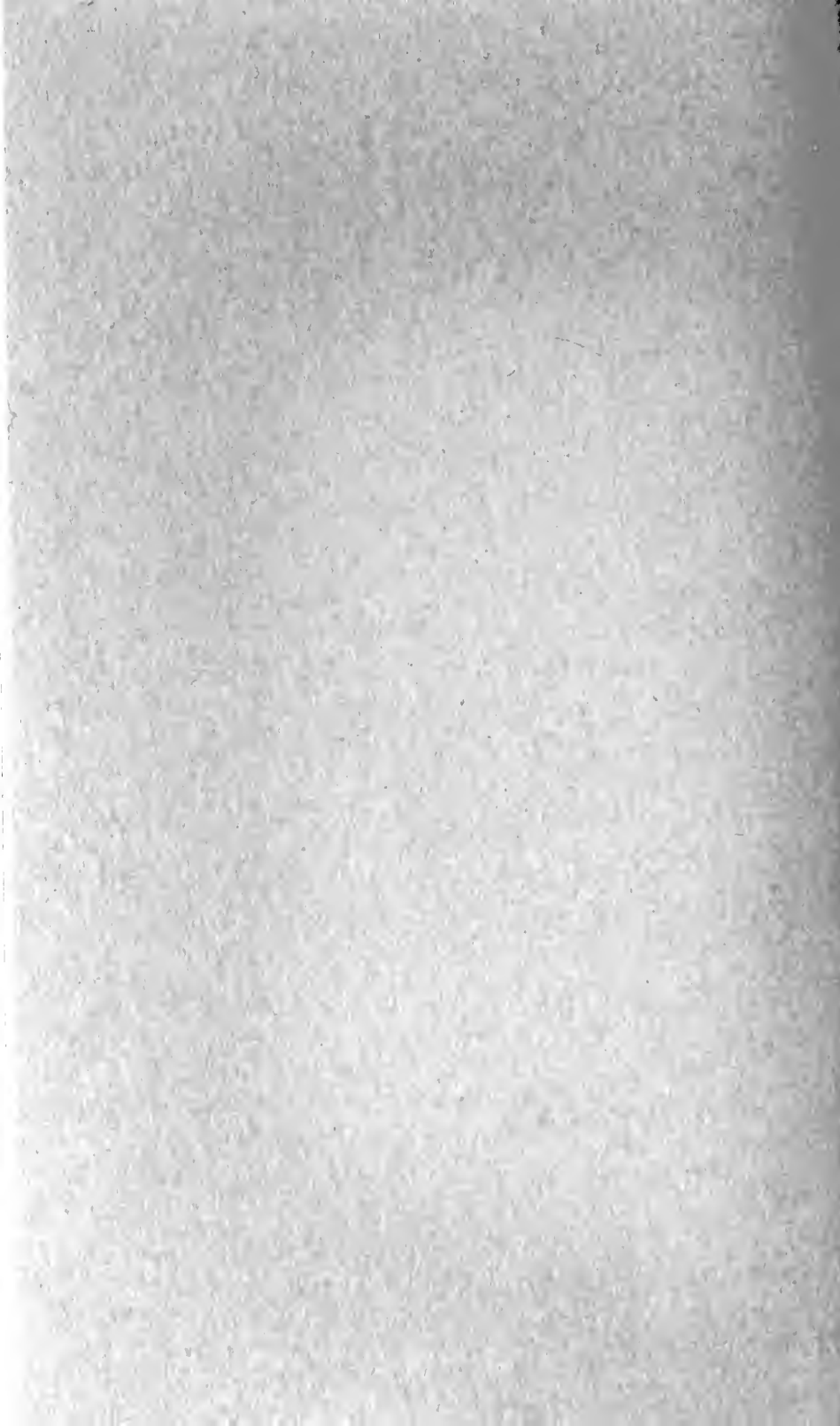
Transcript of Record

Petitions For Enforcement and Petition For Review of an
Order of the National Labor Relations Board

FILED

APR - 9 1958

PAUL P. O'BRIEN, CLERK



No. 15832

United States
Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,
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THE ENGLANDER COMPANY, INC., and
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Local 117.

GENERAL COUNSEL'S EXHIBIT No. 1-K

United States of America

Before the National Labor Relations Board

Nineteenth Region

Case No. 19-CA-1306 — The Englander Company, Inc. and Upholsterers International Union of North America, AFL-CIO, and Local 5 of Upholsterers International Union of North America, AFL-CIO and Case No. 19-CA-1307— Washington-Oregon District Council of Furniture Workers, AFL-CIO.

Case No. 19-CB-416—International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO and Washington-Oregon District Council of Furniture Workers, AFL-CIO.

CONSOLIDATED COMPLAINT

It having been charged in Case 19-CA-1306 by Upholsterers International Union of North America, AFL-CIO, and its Local 5, and in Case 19-CA-1307 by Washington-Oregon District Council of Furniture Workers, AFL-CIO, that The Englander Company, Inc.; and in Case 19-CB-416 by Washington-Oregon District Council of Furniture Workers, AFL-CIO, that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO; have engaged in and are now engaging

in certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, acting pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15 and Section 102.33, hereby issues this Consolidated Complaint and alleges as follows:

I.

The Englander Company, Inc., herein called Respondent Company, is a Delaware corporation engaged in the manufacture of bedding and upholstered furniture, having its principal offices in Chicago, Illinois, with subsidiary offices and plants in various states of the United States. One of its plants, acquired in January 1956, is in Seattle, Washington. The gross sales value of Respondent Company's manufactured products, shipped by it throughout the United States, annually exceeds \$3,500,000.00. The sales value of Respondent Company's products manufactured in its Seattle plant, shipped by it out of the State of Washington, annually exceeds \$50,000.00, and the materials used in manufacture at the Seattle plant, received in shipment from other states, annually exceed \$500,000.00.

II.

The operations of Respondent Company as described in paragraph I above, affect commerce

within the meaning of Section 2 (6) and (7) of the Act.

III.

Upholsterers International Union of North America, AFL-CIO, herein called Upholsterers; Local 5 of Upholsterers; Washington-Oregon District Council of Furniture Workers, AFL-CIO, herein called Furniture Workers; Local 3197 of Furniture Workers; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, herein called Respondent Teamsters; are organizations representing employees in collective bargaining, and as such each is a labor organization within the meaning of Section 2 (5) of the Act.

IV.

Shortly before January 16, 1956, Respondent Company acquired its Seattle plant, being the facilities formerly owned and operated by a Washington corporation known as Craftmasters, Inc. of Washington. Respondent Company took possession of its plant on or about that date, but did not hire any of its production and maintenance employees on that date and did not acquire the normal complement of its employees until on or about February 15, 1956.

V.

On or about January 16, 1956, Respondent Company entered into a collective bargaining agreement with Respondent Teamsters, wherein Respondent Company and Respondent Teamsters agreed to and

did accord said Union exclusive recognition as bargaining agent for all production and maintenance employees in its Seattle plant, and therein agreed that "all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment."

VI.

Beginning on or about January 11, 1956, and thereafter, acting through its Pacific Coast manager, John Sparrowk, and through his subordinates, Respondent Company informed applicants for employment that it had a "national agreement" with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which required all persons selected for hire to become members of a Union affiliated with that organization, or to pledge allegiance to or support of such Union as a condition of hire, and additionally instructed each applicant for employment to go to the offices of Respondent Teamsters to comply with such conditions precedent to hire which said Respondent Teamsters imposed.

VII.

From on or about January 16, 1956, to on or about February 13, 1956, and since said period, Respondent Company assisted Respondent Teamsters in arranging the occasions when Respondent Teamsters informed applicants for employment then seeking work from Respondent Company, that alle-

giance to, support of, and membership in Respondent Teamsters was required as a condition precedent to employment by Respondent Company.

VIII.

Under the circumstances alleged in paragraph IV above, and by its conduct alleged in paragraphs V, VI, and VII above, Respondent Company provided assistance to and support of Respondent Teamsters, in violation of Section 8 (a) (2) of the Act, and discriminated in regard to the hire of employees, and the terms and conditions of employment, to encourage membership in Respondent Teamsters in violation of Section 8 (a) (3) of the Act, and interfered with, restrained, and coerced its employees and prospective employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

IX.

Under the circumstances alleged in paragraph IV, and by its conduct alleged in paragraphs V, VI and VII above, Respondent Teamsters attempted to cause and did cause Respondent Company to discriminate in regard to the hire of employees, and the terms and conditions of employment, to encourage membership in Respondent Teamsters, in violation of Section 8 (a) (3), and thereby violated Section 8 (b) (2) and (1) (A) of the Act.

X.

The action and conduct of Respondent Company and Respondent Teamsters, as set forth in para-

graphs IV through IX above, occurring in connection with Respondent Company's operations in paragraphs I and II above, have a close, intimate, and substantial relationship to trade traffic, and commerce among the several states of the United States, and have led to and tend to lead to labor disputes which burden and obstruct commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1), (2) and (3); 8 (b) (1) (A) and (2); and 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, on this 25th day of April, 1956, issues this Consolidated Complaint against the Englander Company, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, the Respondents herein.

[Seal] THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board
Region 19, 407 U. S. Court House, Seattle 4,
Washington.

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

On January 12, 1956, Upholsterers International Union of North America, AFL-CIO (also referred to herein as the Upholsterers International), and Local 5 (also described herein as the Upholsterers Local) of the Upholsterers International filed a charge with the National Labor Relations Board (designated below as the Board) in Case No. 19-CA-1306 against The Englander Company, Inc. (also referred to herein as Englander or the Respondent Company). On the same date, Washington-Oregon District Council of Furniture Workers, AFL-CIO (also designated herein as the Furniture Workers District Council) filed a charge with the Board against Englander in Case No. 19-CA-1307. An amendment to that charge was filed on February 20, 1956. The Furniture Workers District Council also filed a charge with the Board on March 27, 1956 in Case No. 19-CB-416 against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO (also referred to herein as the Teamsters Local or the Respondent Union). On April 25, 1956, the General Counsel of the Board duly entered an order consolidating the cases in which the several charges had been filed. Based upon the charges, and the amendment men-

tioned above, the General Counsel of the Board issued a complaint on April 25, 1956, alleging that the Respondent Company and the Teamsters Local had engaged, and were engaging, in unfair labor practices within the meaning of the National Labor Relations Act, as amended (61 Stat. 136-163), also referred to below as the Act. The Respondent Company and the Teamsters Local have been duly served with copies of the charges, including the amendment, respectively applicable to them, and with copies of the complaint and order of consolidation.

With respect to the claimed unfair labor practices, the complaint, as amended at the hearing in this proceeding, alleges, in substance, that shortly before January 16, 1956, Englander acquired a plant located in Seattle, Washington, from another company; that Englander took possession of the plant on or about January 16, 1956, but "did not acquire the normal complement of its employees until on or about February 15, 1956"; that beginning on or about January 11, 1956, and before the acquisition of its "normal complement" of employees, Englander informed applicants for employment that it had a "national agreement" with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (also referred to below as the Teamsters International), which required all persons selected for hire by Englander to become members of a union affiliated with the Teamsters International, or to pledge allegiance to, or support of, such union as a condition of hire;

that Englander instructed each such applicant to go to the office of the Teamsters Local to comply with such conditions precedent to hire as the Teamsters Local imposed; that on or about January 16, 1956, Englander and the Teamsters Local entered into a collective bargaining agreement which accords the Teamsters Local exclusive recognition by Englander as the bargaining agent for all the production and maintenance employees of Englander's Seattle plant, and contains a provision that all such employees shall become and remain members of the Teamsters Local not later than 31 days following the beginning of their employment; that since on or about January 16, 1956, Englander has assisted the Teamsters Local "in arranging the occasions" when the latter has informed applicants for employment at the Seattle plant that "allegiance to, support of, and membership in," the Teamsters Local was required as a condition precedent to such employment by Englander; that on February 23, 1956, Englander offered employment to one Robert A. McDonald upon the condition that he become a member of the Teamsters Local, and denied McDonald employment upon his refusal to acquire such membership; that by reason of the terms and conditions of the said collective bargaining agreement with the Teamsters Local, and of its conduct toward applicants for employment, described above, Englander has violated Sections 8 (a) (1), 8 (a) (2) and 8 (a) (3) of the Act; and that by force of the terms and conditions of the agreement, and of its conduct toward applicants for employment, described above,

the Teamsters Local has violated Sections 8 (b) (1) (A) and 8 (b) (2) of the said Act.

Englander and the Teamsters Local have filed separate answers. In its answer, each of the Respondents denies the commission of any of the unfair labor practices imputed to it in the complaint.

Pursuant to notice duly served upon all parties, a hearing was held before me, as duly designated Trial Examiner, on May 22, 23 and 24, 1956, at Seattle, Washington. Each of the parties, with the exception of the Upholsterers International and the Upholsterers Local, appeared and was represented by counsel at the hearing and participated therein. The parties were afforded a full opportunity to be heard, examine and cross examine witnesses, adduce evidence, file briefs, and submit oral argument. After the close of the evidence, I reserved decision on a motion by each Respondent to dismiss so much of the complaint as is applicable to it. The motions are hereby denied for reasons reflected in the findings of fact and conclusions of law set forth below. Englander has filed a brief which has been read and considered. The other parties have not filed briefs.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Nature of the Respondent Company's business; jurisdiction.

Englander is a Delaware corporation, has its principal office in Chicago, Illinois, engages in the

manufacture of upholstered furniture and bedding, and maintains and operates manufacturing facilities in a number of states, including a plant in Seattle, Washington. Products manufactured by Englander at its various plants are shipped by it "throughout the United States." The gross sales value of such shipments annually exceeds the sum of \$3,500,000.00. Between the middle of February 1956 and the hearing in this proceeding, the aggregate sales value of products shipped by the Respondent Company from its Seattle plant to points in other states has exceeded the sum of \$50,000.

The Respondent Company is, and has been at all times material to this proceeding, engaged in interstate commerce within the meaning of the Act. The Board has jurisdiction of this proceeding.

II. The labor organizations involved.

The Upholsterers International, the Upholsterers Local, the Teamsters Local, the Furniture Workers District Council, and Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (also referred to below as Local 3197), an affiliate of the Furniture Workers District Council,¹ respectively represent employees for the purposes of collective bargaining, and are labor organizations within the meaning of the Act.

¹ It may be that the full name of Local 3197 has been stated imprecisely above because the exact name cannot be determined from the record. I have based an estimate of the full name on G. C. Exh. 6.

III. The alleged unfair labor practices.

A. Prefatory statement

Englander divides its operations into geographical divisions. One of these is known as the Western Division and includes the Pacific Coast tier of states. The plants in that area are supervised by John Sparrowk who bears the title of Vice-President of the Western Division and is Englander's chief executive in the area. The responsibility for negotiating collective bargaining agreements for Englander in the Western Division is vested jointly in Sparrowk and another official of Englander named Sidney R. Korshak who has his headquarters in Chicago and holds the title of General Labor Counsel.

Prior to January 1956, Englander operated two manufacturing plants in the Western Division, one located in Los Angeles, California, and the other in Oakland, California, where Sparrowk has his headquarters. At each of these plants a collective bargaining agreement between Englander and one or another local or affiliate of the Teamsters International has been in effect for some time. Each of the two agreements covers terms and conditions of employment of production and maintenance personnel employed in the plant to which the agreement applies.

During the latter part of 1955, Sparrowk made efforts to locate a factory site for Englander in Seattle, Washington. In the course of his search, he learned of the availability of a plant then operated

by a firm named Craftmaster, Inc. of Washington (also designated below as Craftmaster) which had been engaging at the factory site for a substantial period of years in the manufacture of furniture and bedding. In the early part of January 1956 Sparrowk and other representatives of Englander entered into negotiations for a lease of the plant and the purchase by it of some of Craftmaster's inventory and equipment.

On January 10, 1956, Craftmaster terminated the employment of all but a few of its employees and substantially ceased its manufacturing operations (presumably in anticipation of the occupancy of the plant by Englander, although the record does not concretely establish that that was the reason for the termination of the employees and the cessation of production). The few employees retained on the Craftmaster payroll consisted of several supervisors and a number of individuals who variously performed shipping or maintenance duties or worked on an inventory related to the contemplated sale of some of Craftmaster's assets to Englander.

During the period of Craftmaster's manufacturing activities, and at the time the firm discontinued production, there were three bargaining units at the plant, each apparently consisting of different occupational categories. One unit was represented by the Upholsterers Local, another by Local 3197, and the third by the Teamsters Local. Each of the three unions had collective bargaining and contractual relations with Craftmaster at the time the latter ceased its manufacturing activities, and had had

such relations for some unspecified period prior thereto. As of the date production was discontinued, approximately 35 of the employees were members of Local 3197, which is affiliated with the Furniture Workers District Council and had been represented by the latter organization in bargaining negotiations and contractual relations with Craftmaster, and some 71 held membership in the Upholsterers Local. The record does not establish the precise number represented by the Teamsters Local, but as the evidence indicates that Craftmaster had little more than 100 persons in its employ in January 1956, it is a fair inference that the Teamsters Local represented only a few of the individuals employed by Craftmaster during that period, or, in any event, a substantially smaller number than those represented by the other unions in the plant.

On January 9, 1956, William F. Evans, executive secretary of the Furniture Workers District Council, received information, as Evans put it in his testimony, that Craftmaster was "planning on selling the plant" to Englander. On January 11, 1956, on behalf of his organization, Evans wrote a letter to Englander, transmitting therewith a copy of the agreement between the Furniture Workers District Council and Craftmaster; expressing the view that the contract was binding on "successors" of Craftmaster; stating that termination notices had been given to employees by Craftmaster on January 10, 1956 "without any notice or discussion with the proper Union officials"; and requesting an early meeting with representatives of Englander "to dis-

cuss this matter.” Englander received the letter but made no reply to it. Evans discussed the subject of picketing the plant with a business representative of Local 3197 on January 12, 1956, and that organization posted a picket line at the premises the following day. The Upholsterers Local also picketed the plant, posting its pickets on January 12, 1956, the day after Sparrowk interviewed a number of former Craftmaster employees with respect to their future employment by Englander. (These interviews will be discussed in greater detail at a subsequent point.) The plant was picketed for approximately a month by each of the two unions.

The negotiations between Craftmaster and Englander culminated in a lease of the plant to Englander on January 16, 1956, and the purchase by it on that date of a portion of Craftmaster’s inventory and equipment. Englander did not assume any contractual obligations of Craftmaster.

As will appear in great detail later, Englander thereafter hired a substantial number of the individuals, including several supervisors, who had formerly been employed by Craftmaster. One of the supervisors is named “Red” Henry. Englander hired him as shipping department foreman on January 18 or 19, 1956. Another former Craftmaster supervisor named William Moore was hired by Englander as factory foreman on January 23, 1956. Since the date of his employment by Englander, each of the two foremen has made recommendations to Sparrowk for the hiring of employees, and the latter has attached considerable weight to such rec-

ommendations. At one point or another (on a date not specified in the record) the company vested all authority to hire employees in Moore. On February 1, 1956, Englander hired J. E. Hunt, another former Craftmaster supervisor, as factory manager. At all times material to this proceeding since the dates they were respectively hired by Englander, Henry, Hunt and Moore have been vested by the company with authority responsibly to direct the work of employees at the Seattle plant; have exercised such authority; and have been, and are, supervisors within the meaning of the Act.

B. The alleged assistance by Englander
to the Teamsters Local.

Sparrowk testified that in the autumn of 1955, upon his return to his Oakland office from a trip to Seattle where he had been searching for a plant site, he told Joseph Dillon, a representative of the Western Conference of Teamsters, a regional affiliate of the Teamsters International, of the purpose of his trip to Seattle; and that Dillon thereupon said, "We expect to have your Seattle operation under contract on the same basis that we have it elsewhere." What reply, if any, Sparrowk made does not appear. According to Sparrowk, also, on January 9, 1956, while he was in Seattle in connection with the negotiations for the Craftmaster plant, he met Dillon by appointment at the latter's request, and on that occasion, Sparrowk testified, Dillon introduced him to W. L. Williams, secretary-

treasurer of the Teamsters Local, and substantially reiterated what he had told Sparrowk on the previous occasion. Sparrowk testified that he replied that Englander was merely searching for a plant, had not as yet found one, and did not know then whether it would have a plant in Seattle.

Sparrowk spent some time in the plant preceding the execution of the lease, occupying himself with such matters as an inventory which Craftmaster was taking in contemplation of the sale of a portion of its property to Englander. While at the plant on January 11, 1956, Sparrowk interviewed between 15 and 20 individuals who came to the plant in search of employment. A substantial number of these, if not indeed all, had formerly worked for Craftmaster. Among them were individuals whose employment had been terminated by Craftmaster the day before. Some came for their interviews at the invitation or suggestion of Foreman Moore, who then was still on Craftmaster's payroll, while others came upon their own initiative.

One of those interviewed was Jeanette Testerman who was called as a witness by the General Counsel. She had worked for Craftmaster for approximately four years, had served in its plant as a shop steward for Local 3197, and came to the plant for her interview at Moore's suggestion. According to Testerman, during the interview, after some discussion of her duties for Craftmaster, and a prediction by Sparrowk that "there probably would be work" after completion of the inventory, Sparrowk told her that she would have to see Williams and "clear

through" the Teamsters Local. Testerman stated that she did not ask Sparrowk to explain what he meant, and that she "just walked out."

Another former Craftmaster employee, Marvin Bale, who was called by the General Counsel, testified that during the course of his interview on January 11, after he had told Sparrowk of the type of work he had performed for Craftmaster, Sparrowk asked him whether he had "joined the Teamsters Union"; and that upon receiving a negative reply, Sparrowk said that he should join that organization if he "wanted to work" at the plant. According to Bale, he replied that he was a member of "the Wood Workers" (meaning, apparently, Local 3197), and that he would rather retain his membership in that union. Then, Bale testified, Sparrowk referred again to the requirement for joining the "Teamsters Union," and gave Bale the address of the Teamsters Local, writing it on a slip of paper at Bale's request, because, as Bale put it, he is "short on * * * education."

A third former Craftmaster employee, Donald Granger, also called by the General Counsel, testified that he came to the plant for his interview on January 11 at Moore's suggestion; that, following a discussion on that date with Sparrowk concerning such matters as pay and working conditions, Sparrowk told him to see Williams and that he would "have to go down and clear through the Teamsters before (he) could go to work"; and that Sparrowk gave him the address of the Teamsters Local, stating that Englander "had some kind of

agreement with the Teamsters.” According to Granger, Sparrowk also told him that the Teamsters Local would not require him to pay any initiation fees.

Sparrowk gave testimony to the effect that he made substantially the same statements to each employee he interviewed on January 11. Summarizing what he claims he said on that occasion, Sparrowk testified: “I explained to them that we were in a position where we were talking to the Craftmaster principals with regard to acquiring some of the facilities here, that we would probably be in the business of manufacturing items comparable to what Craftmaster had been making. I also informed them that we were told by the Teamsters Union that inasmuch as they had contracts with us in other plants in the country that they would expect to be recognized in this plant. I indicated to them, told them, rather, that I was not in a position to tell them what they could or could not do from a union standpoint, that they were familiar with the contracts in the unions that they had been members of, and I suggested that they see Mr. Williams of the Teamsters Union and that he would be glad to tell them what they had to offer.” Sparrowk also gave testimony to the effect that after he had made these statements “to a couple of people,” he was asked for Williams’ address (by whom or whether by one or more interviewees does not appear in Sparrowk’s account), and that thereafter, during the course of the interviews, he ascertained the address from the telephone book for the pur-

pose of supplying it to interviewees. In all, Sparrowk testified, he referred between 15 and 18 job-seekers to Williams on January 11. Sparrowk denied that he told them to "clear through the Teamsters Union" or to "sign up with the Teamsters."

From what has been stated above, it is evident that there are material conflicts in the testimony on the subject of Sparrowk's remarks on January 11, notably on the question whether Sparrowk in substance told former Craftmaster employees when he interviewed them that clearance by, or membership in, the Teamsters Local would be a condition of their employment by Englander. A resolution of the material issues raised by the testimony of Sparrowk, Testerman, Granger and Bale will be made at a subsequent point in this report following a recital of other pertinent features of the record.

On January 26, 1956, John W. Truman, a representative of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, with which the Furniture Workers District Council and Local 3197 are affiliated, visited Sparrowk at the plant, and told the latter that the Furniture Workers District Council still represented the individuals who had been employed in various departments of Craftmaster's plant, and inquired whether Englander had "taken over" the contract between the Furniture Workers District Council and Craftmaster. Sparrowk replied in the negative. During the discussion that followed, Sparrowk told Truman that "nation-wide" Englander "was under agreement to the Teamsters through a master

agreement" which had been negotiated by Korshak and "a Mr. Pink," on behalf of Englander, with a representative of the Teamsters International. Truman stated that the organization he represented has "jurisdiction in these types of plants all through the West Coast," that he knew of none in which "the Teamsters have jurisdiction," and that "we were in a position to furnish him (Sparrowk) qualified men for the type of work that he needed." Sparrowk replied that he "appreciated that very much," but that "he was bound by the master agreement with the Teamsters International." Sparrowk also stated that Englander had "good working relations" in the "plants covered by the Teamsters' agreements," that he did not "want to jeopardize them (such relations) by signing this plant to another organization," and that he felt that if he did so, Englander "would be subject to reprisals by Teamsters in other locations."

Truman met with Sparrowk again on February 3, 1956, and on that occasion reiterated the claim of representation of former Craftmaster employees; offered to discontinue the picketing by Local 3197, provided Englander hired individuals formerly employed in the plant's millroom by Craftmaster; and proposed that Englander consent to a representation election to be conducted by the Board. Sparrowk rejected the election proposal, advancing the reason that Englander had a "master agreement" with the Teamsters International. However, at one point or another during the discussion, Sparrowk expressed the view that an arrangement could be

made whereby the Furniture Workers District Council could represent millroom employees, and the Teamsters Local all other employees. Truman then offered to remove the pickets provided Englander "would go to an NLRB election or sit down and come to some agreement with us and negotiate a contract." Sparrowk replied that the picket line should not be removed; that he was leaving for California to meet someone (whom, he stated, he was unable to identify); that he believed that "the whole matter could be cleared up" upon his meeting with this individual; and that he would call Truman from Oakland in that connection, but that if he did not do so, Truman should call him at his hotel upon his return to Seattle a few days later.

Truman called Sparrowk in Seattle on February 6, and Sparrowk told him that he was about to leave for a meeting with Williams, and inquired of Truman whether he had heard from Williams. Truman replied that he had, and that Williams had asked him to come to the office of the Teamsters Local that afternoon. Truman asked Sparrowk whether the latter knew the purpose of that meeting, and Sparrowk replied that he "thought it better" that Truman secure the information from Williams. Truman and a representative of Local 3197 kept the appointment with Williams. In the course of the meeting, Williams described an accord he asserted had been reached between the Upholsterers International and his organization concerning the representation of upholsterers at

Englander's Seattle plant, and he offered "to let" Local 3197 retain its "jurisdiction in the mill-room" if he, in turn, were permitted to select the other job categories in the plant to be subject to the jurisdiction of the Teamsters Local. In substance, Truman declined to accept the offer.²

As of February 10, 1956, Englander had only eight non-supervisory employees on its payroll at the Seattle plant, and had not as yet begun production at the factory on any substantial scale. On February 10, a representative of the Teamsters Local named Bombardier (also spelled Bombadier in the record) telephoned Testerman at her home and asked her if she wished to go to work at the plant on the following Monday, February 13. She inquired "if the labor dispute was straightened out," and Bombardier replied that "they had a contract" at the plant and that the picket line "wasn't legal." Testerman reported the telephone conversation to Evans and Carl Kissick, the financial secretary of Local 3197.

Early on the morning of February 13, shortly before Englander's plant opened, about 60 former Craftmaster employees came to the plant in search of employment. Approximately half of these were members of Local 3197, and about an equal number were members of the Upholsterers Local. The members of Local 3197 were present at the instance

² Findings made above with respect to Truman's conversations with Sparrowk on January 26 and February 3 and 6, and his meeting with Williams on February 6, are based on Truman's uncontradicted testimony.

of representatives of their union who had "notified" them to come to the plant after the receipt of reports such as Testerman's. Truman, Evans and Kissick were at the plant on the occasion in question, as were Ralph Royer, business agent of the Upholsterers Local, and Williams and some seven or eight companions (described by Truman in his testimony as "seven or eight Teamsters").

When the doors to the plant opened, the jobseekers and the union representatives entered, Truman leading the members of Local 3197. After Truman and Williams entered the plant, they went to Sparrowk's office at the latter's request. Hunt, the factory manager, was also present. In the office, Sparrowk imputed responsibility to Truman for the entry of jobseekers into the plant that morning, rebuking Truman for it, and stating, in effect, that the hiring of employees was Englander's function and prerogative. At about this point, Evans, who was stationed outside the office and had heard the "loud talking" (as he termed it) entered the office, and, addressing himself to Sparrowk and Hunt, stated that "there was a misunderstanding because, if anybody was responsible for the members of Local 3197 being down there to go to work that morning, it was the Teamsters, and specifically Mr. Williams and others of his staff whom I don't know." Evans also expressed the view that "apparently Mr. Williams is acting as your personnel manager." Hunt replied that Williams had a right to ask job applicants to come to the plant because his organization had a contract with Englander.

That appears to have ended the discussion in the office.³

³ The respective versions of Evans, Truman and Sparrowk are in substantial accord on the subject of Sparrowk's rebuke to Truman, but there is conflict in the testimony with respect to Hunt's remarks. Neither Hunt nor Williams testified. Evans quotes himself in his account as addressing his remarks to Hunt and Sparrowk, and imputes a statement to Hunt to the effect described above. Evans' testimony suggests the possibility that Sparrowk left the office before Hunt's remarks to talk to the jobseekers. Truman's testimony is to the effect that a statement such as Evans imputes to Hunt was made, but he expresses some uncertainty whether Hunt or Sparrowk made it, stating that "at or about that time" Sparrowk left the office to address the jobseekers. Sparrowk's testimony makes no reference to Evans' presence. Sparrowk, however, denied that Hunt said anything in his "presence" about Williams "doing the hiring in the plant." Sparrowk testified that he has since "substantiated the fact" that he did not leave the office until "after the union officials left the room." Upon observation of Sparrowk, I gathered the impression that he has no certain independent recollection that he was in fact in the office at the time of the remarks imputed to Hunt by Evans. The Respondent Company offered no explanation of its failure to call Hunt who is, after all, the one to whom Evans attributes the remarks in question. Moreover, there is good reason to believe from the undisputed evidence of what Sparrowk told Truman on January 26 and February 3 that there had been in effect for some time prior to the office discussion an understanding (not fully articulated in the record, although termed a "master agreement" by Sparrowk) between Englander and the Teamsters International governing the representation of employees in the company's plants on a "nation-wide" basis. It is also noteworthy that, according

At one point or another after his conversation with Truman, Sparrowk left the office and addressed the jobseekers briefly, telling them in effect that the plant was ready to open for production. Englander hired 6 employees on February 13, bringing its roster of non-supervisory employees to 14.

Shortly after the discussion in the office, the Upholsterers Local held a meeting of its members who had formerly been in Craftmaster's employ. Williams attended and spoke to the group, describing his organization's pension and insurance programs.

to Sparrowk's own testimony, the Teamsters Local some time prior to February 13 signed and submitted a proposed agreement to Englander's Chicago office. Although Sparrowk claims that he signed the document on February 15 or 16, after reaching the conclusion that the Teamsters Local represented a majority of employees in the plant upon "proof" submitted to him by Williams, it may be noted that Sparrowk neither negotiated the agreement nor even read it in full, and that it is little more than a duplicate in form and substance of the contract in effect at Englander's Los Angeles plant. In any event, bearing in mind the unexplained failure to produce Hunt as a witness, and in the light of Sparrowk's statements to Truman on January 26 and February 3 concerning the "master agreement" between Englander and the Teamsters International, and of Sparrowk's somewhat pro forma approach to the execution of the contract with the Teamsters Local, notwithstanding Sparrowk's claim (which will be evaluated at a later point) that he did not sign the contract until February 15 or 16, I am persuaded that Evans' testimony concerning Hunt's remarks is credible, and have made corresponding findings.

An official of another local of the Upholsterers International, who was at the meeting, reported to those present the contents of a telegram that had been received from the president of the parent body to the effect that members of the Upholsterers Local were to "go to work under the Teamsters' agreement, * * * but still remain members" of the Upholsterers Local. Williams left the meeting at some point thereafter, and the membership voted to work at the plant "under the Teamsters' agreement." Local 3197 also held a meeting either on the same or the next day of members who had worked for Craftmaster. (There are variances in the record as to the date of the meeting.) Truman advised the former Craftmaster employees present to seek employment at the plant and to apply for membership in the Teamsters Local if that were necessary to secure employment at the factory.⁴

⁴ The description of both meetings is based on evidence received without objection. What was said on both occasions is obviously not binding upon the Respondent Company, and I base no finding that the firm has engaged in unfair labor practices upon what was said at either meeting. Similarly, the events at the meeting of Local 3197, as well as the discussion at the meeting of the Upholsterers Local after Williams left, is not binding upon the Teamsters Local. The events at both meetings are actually immaterial to the issue whether Englander has abridged the rights guaranteed employees by Section 7 of the Act, and has rendered unlawful assistance to Englander. I have described the meetings as part of the chain of events depicted in the evidence, although it may be noted that, as far as the Teamsters Local (although not Englander) is concerned, the references to the "Teamsters' agree-

A substantial number of former Craftmaster employees who were present at the meeting of Local 3197 then went to the office of the Teamsters Local, made application there for membership in that organization, and signed a document (G.C. Exh. 9) which provided, among other matters, that the signatories agreed to "accept * * * all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company" and to become members of the Teamsters Local "immediately upon going to work for the Englander Company."

Englander began production on a substantial scale on February 14, hiring 60 employees on that date, an additional 18 on February 15, and 4 more on the following day, bringing the total number of non-supervisory employees on the payroll as of February 16 to 96.

The General Counsel contends that not only Sparrowk but Foremen Henry and Moore made unlawful statements to individuals who applied for employment at the plant, and called several witnesses in support of the claim. One such witness, Fred Rober, who had been employed by Craftmaster and had served as "picket captain" during the picketing of the plant by Local 3197, testified that he spoke to Henry and Moore together on Febru-

ment" in Williams' presence at the meeting of the Upholsterers Local may be taken as evidence, in the context of the whole record, that a contract was in effect on February 13 between the Teamsters Local and Englander. I shall advert to this matter again at another point below.

ary 13 and asked them for employment; that they told him that a job was available for him but that he would "have to clear through the Teamsters"; that on the following day, after attending a meeting of Local 3197,⁵ he and 10 others who had been at the meeting went to the Teamsters Local where they signed a document (G.C. Exh. 9, which has been described above); and that he then proceeded to the plant where he resumed the same type of work he had performed for Craftmaster.

Another witness, Josephine Griffin, who had not previously been employed by Craftmaster, but was a member of Local 3197, testified that she spoke to Moore on February 14 concerning her application for employment; that he told her that a job was available for her, "but first you have to get it straightened out with the Teamsters"; that upon her inquiry whether "it isn't settled yet, it is not going to be Furniture Workers," he replied that "it isn't settled yet one way or the other"; that she asked Moore whether she would be employed if "I join the Teamsters"; that Moore replied in the affirmative; that she reported the incident to Kiskick later that morning, and upon his advice proceeded to the office of the Teamsters Local the same day and signed an application for membership in

⁵ This was apparently the meeting, described above, at which members of Local 3197 were advised to join the Teamsters Local if that were necessary to secure employment at the plant. As indicated earlier, I base no findings of unfair labor practices on the testimony of Rober and others describing the meeting.

that organization; and that she entered Englander's employ on February 16.

Robert A. McDonald, a former Craftmaster employee, testified that he applied to Henry for employment on February 20; that Henry told him that no job was available for him; that Henry telephoned him the following evening and said that a position was available and that he "would have to clear through the Teamsters"; that he replied that he "would like to think it over" and made an appointment with Henry for February 23; that when he came to the plant on that date he did not speak to Henry but talked to Moore; that, after an explanation by Moore of the duties he would be required to perform, Moore told him that he "would have to join the Teamsters"; that he (McDonald) refused, stating, "Why join the Teamsters when the Carpenters & Joiners have the furniture plants"; that Moore then asked him why he should be "the only one not to join the Teamsters when everybody else has"; that he (McDonald) repeated his refusal "to join the Teamsters"; that Moore then said, "Well, I guess we can't do any business, that will be about it"; and that with that the interview ended. McDonald did not enter Englander's employ.

Henry did not testify, but the Respondent Company called Moore as a witness. The latter denied that he told "any employee or prospective employee that he had to join the Teamsters Union," or that he made any suggestion that any such individual do so. The credibility issues raised by the testimony

of Moore, McDonald, Rober and Griffin will be resolved at a subsequent point in this report.

At one point or another (as will appear, the date is uncertain), Englander and the Teamsters Local entered into a contract affecting employees of the Seattle plant.⁶ Korshak, Sparrowk, Williams and Dillon signed the agreement on behalf of their respective principals. (It may be noted in passing that Dillon signed on behalf of the Western Conference of Teamsters, although the agreement states that it is "entered into" between the Teamsters Local and Englander.) The contract and the one applicable to Englander's Los Angeles plant are identical except for a few insertions in each and appear to follow a common form, as is evidenced not only by the language common to both contracts but by identically situated blank spaces provided for insertions such as, for example, the location of the Englander plant affected and the number of the local of the Teamsters International involved.

By the terms of the agreement applicable to the Seattle plant, Englander recognizes the Teamsters Local "as the exclusive bargaining agent for all production and maintenance employees" (with some

⁶ The name of the contracting labor organization is set forth in the agreement as "General Teamsters, Chauffeurs and Helpers Union, Local 117." There can be no doubt that this is the Respondent Union, although it is elsewhere identified in the record as "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO."

exceptions not relevant here). The contract provides, among other things, that it is to remain in effect until December 1, 1958, and to continue in effect thereafter unless either party serves a specified written notice of cancellation or termination upon the other; and that "as a condition of continued employment, all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment or the effective date of this clause, whichever is the later." (For convenience of reference the clause relating to union membership will be referred to below as the union shop provision.)

There is no evidence that the contract was the product of bargaining negotiations. Sparrowk, who is the only Englander representative stationed in the Western Division who has authority to negotiate collective bargaining agreements for the company, testified that he did not negotiate the agreement, and that he "doesn't know of any negotiation." Dillon, Korshak and Williams (who was present at the hearing) did not testify, and there is no information in the record as to the respective dates upon which they signed the contract. The only evidence pertaining to the execution of the agreement appears in Sparrowk's testimony.

In that connection, he testified that he received a telephone call at his Oakland office from Chicago, on or about February 6, 1956, from his superior, Chester Pink, vice-president in charge of England-

er's manufacturing operations, who told him that "there was in the Chicago office a contract that had been signed by Joseph Dillon and W. L. Williams and sent or given to some one in Chicago applying to the Seattle plant." According to Sparrowk, Pink also said that he wished to send the contract to Sparrowk but that he did not want the latter to sign the agreement or any other collective bargaining contract until Sparrowk was convinced that the union involved represented a majority of the employees. Sparrowk also testified that late in the afternoon of February 13, while he was in Seattle, Williams called him and told him that a "majority of the labor pool that we (Englander) were interested in" had signed applications for membership in the Teamsters Local; that he replied that he would "like to have proof of that"; that Williams requested him to come to the office of the Teamsters Local to examine the proof; that that evening he (Sparrowk) examined the applications for dates and names and counted in excess of 60; that upon his examination, he was "convinced" that the Teamsters Local represented a majority of the production and maintenance employees hired by Englander up to that point for the Seattle plant; and that on the morning of February 15, Williams came to the plant, showed him a document (G.C. Exh. 9) containing signatures (some 87 at that time, according to the sense of Sparrowk's testimony), and told him that these "represented the signatures that he had of the people who had made application (for membership in the Teamsters Local) to that date."

According to Sparrowk's account, after his conversation with Williams on February 15, he returned to Oakland by plane and found upon his arrival at his office there that the contract he had discussed with Pink on the telephone some 10 days earlier had arrived from Chicago. Sparrowk also testified that he read only the first two or three paragraphs of the document and a few handwritten insertions because of information from Pink that the contract was similar to that in effect at the Los Angeles plant; that he signed the contract on February 15 or 16 and then sent it to the Chicago office; that Korshak's signature was not on the document at that time; that he does not know when Korshak signed it; and that Englander gave effect on February 15, 1956, to a provision in the agreement dealing with contributions by the company, for employees of the Seattle plant, to a pension fund of the Western Conference of Teamsters.

C. Discussion of the issues and concluding findings.

Turning first to the question whether Sparrowk made statements to job applicants on January 11 to the effect that clearance by, or membership in, the Teamsters Local was to be a condition of employment at the plant, the credibility issue is not easily resolved because the testimony on both sides of the question is not wholly reliable.

Sparrowk left me with the impression at a number of points that he was not a forthright witness.

One example may be found in his disclaimer of any knowledge of the circumstances that brought job applicants to the plant on January 11. In that regard, he testified that he "would say" that those whom he interviewed came to the plant "voluntarily seeking employment," and that he had no knowledge prior to the interviews "of how it happened" that the job applicants came to the plant. Yet this is contradicted by Moore who stated that he asked a number of former Craftmaster employees to come to the plant for interviews with Sparrowk, that before he did so he informed Sparrowk of his intention, and that Sparrowk "suggested that it might be a good idea that some of them come in and talk to him." I do not believe Sparrowk's disclaimer of any prior knowledge of Moore's request to former Craftmaster employees to come in for interviews, and upon my observation of Sparrowk's demeanor, I am of the opinion that his disclaimer was rooted in a disposition to avoid or hedge on facts which, in his judgment, might compromise him.

A more important example of a lack of forthrightness in Sparrowk's testimony is to be found in the justification he advances for referring between 15 to 20 job applicants to the Teamsters Local on January 11. His explanation for his action is that he had been "advised by representatives of the Teamsters that they expected to have the Seattle operation as they have it elsewhere in the country," and that he therefore "invited the people (those interviewed) to ascertain what they (the Teamsters Local) had to offer so when the decision was made

they would know the entire content of what all three of the unions could offer." The interviewees, it may be noted, had not asked to be "invited" to the Teamsters Local; there is no evidence that any of them were dissatisfied with their own unions or expressed any dissatisfaction with them to Sparrowk; and it is evident even from Sparrowk's own testimony that it was he who injected the name of the Teamsters Local into the interviews, with knowledge that those he interviewed were members either of Local 3197 or the Upholsterers Local.

Be that as it may, Sparrowk's explanation strikes an implausible note, and, I am persuaded that it is no more than an afterthought calculated to conceal the real reason for the referral of the job applicants to the Teamsters Local. The real motivation may be found in the undisputed evidence of what Sparrowk said to Truman on January 26. On that occasion, it will be recalled, Sparrowk told Truman that Englander had entered into a "master agreement" of "nation-wide" scope with a representative of the Teamsters International; that he "was bound by the master agreement"; that Englander had "good working relations" in its "other plants covered by the Teamsters' agreements"; that he did not want to jeopardize such relations "by signing this plant to another organization"; and that he felt that if he did so, Englander "would be subject to reprisals in other locations." Significantly, also, during their conversation on February 3, Sparrowk rejected Truman's reasonable proposal for a Board-conducted election to determine the representation

wishes of the employees, basing his refusal on the existence of the "master agreement."⁷ I think it plain that Englander was predisposed at the time of the interviews, if not indeed under some sort of obligation to the Teamsters International, to recognize the Teamsters Local as the representative of its production and maintenance employees at its then contemplated manufacturing facility in Seattle, and that, in furtherance of that predisposition, Sparrowk referred substantially all those interviewed on January 11 to the office of the Teamsters Local as a means of assisting that organization in securing the adherence of former Craftmaster employees to the Teamsters Local instead of the other unions to which they then belonged. The sum of the matter is that I am unable to place any credence in Sparrowk's self-serving description of his motive in referring the interviewees to the Teamsters Local.

Sparrowk admittedly referred practically all those he interviewed to the office of the Teamsters Local. Bearing in mind the setting in which the interviews occurred, and the fact that the referrals were unsolicited and made upon his initiative, I do not think it unnatural that job applicants should

⁷ At one point Sparrowk testified that he does not know where the term "master agreement" originated and that he knows that Englander does "not have such a thing." Yet Sparrowk's own version of what he told a large group of jobseekers at the plant on January 16 includes testimony that he "referred to" the agreement in talking to the group. Moreover, as pointed out above, Truman's account of his conversations with Sparrowk on January 26 and February 3 is uncontradicted.

interpret his statements as meaning that clearance by, or membership in, the Teamsters Local was to be a condition of employment at the plant. Yet, notwithstanding the appraisal of Sparrowk's testimony given above, I entertain a substantial doubt that Sparrowk expressly voiced such a condition. In that connection, it should be borne in mind that the burden of establishing that Sparrowk made statements in the terms imputed to him by Granger, Testerman and Bale is upon the General Counsel.

Although Granger in his testimony quotes Sparrowk as telling him that he would "have to go down and clear through the Teamsters" as a condition of employment at the plant, an affidavit purportedly describing the interview, given by Granger to a representative of the General Counsel only a few days after the interview, does not quote Sparrowk as prescribing clearance by the "Teamsters" as a condition of employment.⁸ Because of the discrepancy, I am unable to place any reliance on Granger's claim that Sparrowk voiced such a condition, although I have no doubt that Sparrowk told Granger to see Williams at the office of the Teamsters Local. It may be, as Granger claims, that Sparrowk told him that he would not be required to pay any initiation fees to the Teamsters Local, but in

⁸ The relevant portion of the affidavit reads as follows: "He (Sparrowk) said that I should go to the Teamsters Union Hall at 522 Dennyway and see Bill Williams who would take care of me. I asked him about initiation fees. Mr. Sparrowk said that initiation fees had been taken care of and that I wouldn't have to pay any; then I left."

view of the discrepancy noted above, and the absence of any evidence that Sparrowk expressed himself to a similar effect to any other interviewee, the weight of the evidence will not support a finding that Sparrowk made the statement on the subject of initiation fees imputed to him by Granger.

Testerman, it may be noted, unlike Granger and Bale, does not quote Sparrowk, in terms, as prescribing membership in, or clearance by, the Teamsters Local as a condition of employment. I have no doubt that Sparrowk told her to see Williams, as she asserts, but I have some reservation that he told her, in terms, that she would have to "clear through" the Teamsters Local. There is some indication in Testerman's testimony of a tendency by her to place an interpretation on things she heard Sparrowk say which differs somewhat from the actual content of what was said. She imputes a statement to Sparrowk at the plant on January 16 to a large group of jobseekers (some 75 or 80, according to the evidence) that as far as he knew "this master agreement * * * with the Teamsters * * * would cover the Seattle plant, too." This is not quite in accord with the version given by Granger, the only other employee called by the General Counsel on the subject of Sparrowk's remarks on that occasion. On the subject of the "master agreement", Granger quotes Sparrowk as saying that Englander has "a master agreement * * * with the Teamsters throughout the country in the rest of their plants." Sparrowk did allude to a "master agreement" on the occasion in question, but I believe that he did

so in terms of a statement, as Sparrowk described it, that Englander had been "told by the Warehousemen's Union that they would have this plant (in Seattle) inasmuch as they have Englander factories elsewhere in the country * * *" It is not improbable that Testerman drew the inference from Sparrowk's allusion to the "master agreement" that what he was saying was that the "master agreement" would "cover the Seattle plant, too." Similarly, I am of the opinion that Testerman interpreted Sparrowk's proposal that she see Williams to mean that she would have to "clear through" the Teamsters Local. In sum, I am unconvinced that Sparrowk told her, in terms, to "clear through" the Teamsters Local in the course of his proposal that she see Williams.

Bale describes Sparrowk as asking him whether he had "joined the Teamsters Union," and as stating that he should join that organization if he "wanted to work" at the plant. No other interviewee quotes Sparrowk as inquiring into his union affiliation, nor as stating expressly that he should join the Teamsters Local as a condition of employment. (Granger quotes Sparrowk as telling him to "clear through the Teamsters" as a condition of working at the plant, and not as stating that employment was conditioned upon membership in that organization.) Bearing in mind that Sparrowk interviewed some 15 to 20 persons on January 11, one must take into account the fact that Bale was the only interviewee produced by the General Counsel who attributes an inquiry by Sparrowk into union

affiliation, and expressly imputes a statement to Sparrowk to the effect that membership in the Teamsters Local was to be a condition of employment. In that posture of the record, notwithstanding my conviction that Sparrowk was not a forthright witness and also, as will appear, did not accurately describe what he told at least some of the persons he interviewed, I do not believe that the evidence preponderantly establishes that Sparrowk expressed the employment condition Bale imputes to him.⁹

Although the weight of the evidence will not support a finding that Sparrowk told any job applicant on January 11 that he or she would have to "clear through" the Teamsters Local or that clearance by, or membership in, that organization was to be a condition of employment, I am convinced, on the other hand, that Sparrowk's version of what he said to those he interviewed goes substantially beyond what he actually told them. In effect, he imputes to himself the expression of a position of neutrality toward the question of representation of the employees. The substance of his testimony in that regard is that after he told the job applicants that the "Teamsters Union" expected "to be recognized in this plant," he informed them that he "was not in a position to tell them what they could

⁹ Even if Sparrowk did ask Bale whether he had joined the "Teamsters Union", it is unnecessary to pass on the question whether this isolated inquiry violated the Act. It may be noted that the complaint does not allege any unlawful interrogation of employees.

or could not do from a union standpoint." No other witness who testified on the subject of the interviews quotes Sparrowk to that effect, and this applies to two job applicants called by the Respondent Company. One of these, George Mertel, was asked on his direct examination whether Sparrowk made any "reference at all to the Teamsters Union," and he replied "not that I know of." This, it may be noted, is not quite in accord with Sparrowk's testimony, for the sense of Sparrowk's version is that he did refer to the "Teamsters Union" in all the interviews.¹⁰ Be that as it may, Daniel A. Walters, another witness called by the Respondent Company, denied during his direct examination that Sparrowk ever told him that he "had to become a member of the Teamsters Union." At a subsequent point in his testimony, describing what Sparrowk told him "about the Teamsters" on January 11, Walters stated: "He (Sparrowk) just gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union." The

¹⁰ Mertel described a conversation with Sparrowk concerning the "Teamsters" which, according to Mertel, took place shortly before the interview while both he and Sparrowk were "out on the shipping room floor." Mertel quotes Sparrowk as telling him on that occasion that "everything is Teamsters", that "I don't know which way it is going to go", and that "you may have to and you may not" (presumably meaning that Sparrowk did not know whether Mertel would be required to join the Teamsters Local).

witness also testified that he did not ask Sparrowk for the address of the Teamsters Local, and that Sparrowk "just wrote the address on a slip of paper." Walters, who is 74 years of age and was among those terminated by Craftmaster on the day preceding the interview, went directly from the interview to the office of the Teamsters Local and there signed an application for membership in that organization.¹¹

Perhaps Sparrowk did tell some of those he interviewed that he "was not in a position to tell them what to do from a union standpoint," but I am persuaded that at least in the cases of those job applicants who testified concerning their interviews he made no such statement.¹² Moreover, the expres-

¹¹ In his direct examination, Walters gave no details of any interview on January 11, and he stated that he was not at the plant on that date. During his cross examination, he was shown a copy of his application for membership in the Teamsters Local, which is in evidence and is dated January 11, 1956, and his recollection was thereafter refreshed as to the circumstances in which he signed the application. He then proceeded to describe his interview with Sparrowk, stating, in substance, that it took place on January 11, shortly before he signed the application on that date.

¹² According to Kissick, he was stationed, among a group of jobseekers, outside the open door of the office in which the interviews took place and overheard portions of what Sparrowk said. In his testimony, Kissick denied that he heard Sparrowk tell the interviewees to "make their own decisions" regarding their union affiliation, and describes Sparrowk as giving them the address of the Teamsters Local and telling them to go there for their "affiliation."

sion of neutrality which Sparrowk attributes to himself is open to substantial doubt, to say the least, in the light of his statements to Truman on January 26 and February 3, and of the fact, as will appear, that Englander and the Teamsters Local entered into their contract at a time when they had no lawful right to do so, all warranting an inference that Englander had a preference for the Teamsters Local at the time of the interviews, and that Sparrowk referred the job applicants to that organization in furtherance of that preference. In sum, putting together those portions of the testimony which I regard as reliable, including testimony given by Sparrowk and the witnesses called by the General Counsel, what credibly emerges from the record on the subject of what Sparrowk said in connection with union affiliation during the interviews is that he proposed to a substantial number of job applicants on January 11 that they go to the office of the Teamsters Local to discuss the subject of applying for membership in that organization; and that he supplied the address of the Teamsters Local to interviewees, in one case at least (that of Bale) writing the address on a slip of paper at the job applicant's request, and in other instances furnishing the address without any request for it.

The question is presented whether Sparrowk's conduct in referring the job applicants to the Teamsters Local, as found above, constituted unlawful support of that organization in violation of Section

8 (a) (2) of the Act. I am unable to view Sparrowk's conduct as privileged by the terms of Section 8 (c) which provides, in part, that the "expressing of any views, argument or opinion * * * shall not constitute or be evidence of an unfair labor practice * * *, if such expression contains no threat of reprisal or force or promise of benefit." What Sparrowk told Walters, for example, did not constitute the expression of "any views, argument or opinion." It was a verbal act, namely, that of telling Walters "to go up there and talk it over with the Teamsters about application for membership in the union," and was implemented by another act, that of furnishing Walters with the address of the Teamsters Local on a slip of paper.¹³

"It has repeatedly been held that an employer may not intrude in matters concerning the self-organization of employees. He must refrain from all interference. He must maintain a neutral attitude. Especially is this so where the adherence of the employees is being sought by rival labor organizations" (Harrison Sheet Steel Co. v. N. L. R. B., 194 F. 2d 407). This language of the Court of Appeals for the Seventh Circuit in the cited case is particularly applicable to the question under consideration. Sparrowk admittedly was aware that those he interviewed were at the time members either of the Upholsterers Local or Local 3197. It is

¹³ Cf. Minnesota Mining & Manufacturing Company, 81 NLRB 557 (and cases cited), enforced 179 F. 2d 323 (C.A. 8).

evident that none of the job applicants had expressed any dissatisfaction with those unions or sought the "advice" which Sparrowk gave them; and that he gratuitously referred them to the Teamsters Local for a discussion of their affiliation with that organization, injecting a subject into the interviews which had no relevancy to the purpose for which the job applicants had come to see him. The setting in which Sparrowk did this was one in which these individuals were seeking work from him and were dependent upon his approval for an opportunity to resume their employment at the plant in the event that Englander undertook its operation, as it actually did only a few days later.¹⁴ In that setting, it would be only natural for the job applicants, as it is evident some of them, at least, did, to construe Sparrowk's ungermane and unsolicited proposal that they go to the Teamsters Local to discuss applications for membership in that organization, as meaning that Englander preferred

¹⁴ Although the transaction with Craftmaster was not concluded until January 16, the evidence warrants the inference that at the time of the interviews, Englander anticipated that it would soon occupy the plant. In that regard it may be noted (1) that Craftmaster ceased production and terminated its employees on January 10; (2) that Sparrowk interviewed job applicants on January 11; (3) that he spent much of the week preceding the execution of the lease in the plant in connection with the inventory; and (4) that he admitted that he told some of the applicants that he "hoped" that Englander would begin work at the plant on January 16.

the Teamsters Local over the other unions, and that clearance by, or membership in, the Teamsters Local was to be a condition of employment at the plant. Although various job applicants did not take Sparrowk's advice, but instead reported it to their own unions, a revealing glimpse of the impact that conduct such as Sparrowk's can have upon a job applicant is afforded by the fact that Walters, an elderly man in search of work, who at the time of the interview was a member of Local 3197, plainly lost no time in going to the office of the Teamsters Local to sign an application for membership in that union. The sum of the matter is that Sparrowk's conduct was anything but neutral, particularly if one takes its setting into account, and that it was an intrusion by him "in matters concerning the self-organization of employees." In the light of the whole record, including the fact, as will appear, that Englander entered into the contract with the Teamsters Local when it had no lawful right to do so, I find that Sparrowk's purpose in referring the job applicants to the Teamsters Local was to provide that organization with an opportunity to wean the job applicants away from other unions, in a climate of implied approval by Englander, with the ultimate end in view of recognition by Englander of the Teamsters Local; and that as a result of Sparrowk's conduct, Englander contributed support to the Teamsters Local in violation of Section 8 (a) (2), and interfered with the exercise by employees of rights guaranteed them by Section 7 of

the Act, thereby violating Section 8 (a) (1) of the statute.¹⁵

Turning to the claim that Foremen Henry and Moore made unlawful statements to job applicants, it may be noted that Henry, although still employed by Englander, was not called as a witness, nor is there any explanation by the Respondent Company of its failure to call him. Thus McDonald's testimony that Henry told him on the telephone on the evening of February 21 that a position was available and that he "would have to clear through the Teamsters" is uncontradicted. Another factor to

¹⁵ In one of his versions of his remarks to a large group of jobseekers on January 16, Sparrowk gave testimony to the effect that he told the group that if by suggesting "to some of the people" (presumably meaning interviewees a few days earlier) that they "find out the content of what could be offered to them" by the Teamsters Local, there was "some misunderstanding as to union affiliation I wanted them to know that I definitely was not in a position to tell them what to do." This testimony affords no basis for a holding that Sparrowk dispelled the unfair labor practices found above. For one thing, another version by Sparrowk of his remarks on January 16, given earlier in his testimony, does not contain statements to the effect set out above. For another, it is not established that all the job applicants referred to the Teamsters Local on January 11 were present at the plant on January 16. Walter's testimony suggests that he was not there on that occasion. It may also be borne in mind that Walters had visited the office of the Teamsters Local, upon Sparrowk's advice, and had already applied for membership in that union, before Sparrowk's remarks on January 16, whatever their content.

bear in mind is that both Griffin and McDonald gave circumstantially detailed accounts of their respective discussions with Moore, while the latter gave no description of any conversation with either Griffin or McDonald. Substantially all that appears in Moore's testimony in that connection is a blanket denial that he told "any employee or prospective employee that he had to join the Teamsters Union" or that he made any suggestion to that effect; and that he does not recall McDonald "specifically." In view of Moore's position and the important role he played, according to the sense of Sparrowk's testimony, in the recruitment of employees for Englander's new plant, I think it wholly plausible that both Griffin and McDonald had conversations with him concerning employment at the plant; yet for all that appears in Moore's testimony, Griffin and McDonald did not even discuss the subject of employment with him. I believe that they did, and Moore's failure to give details of any conversation with either Griffin or McDonald detracts from the force of his testimony. Moreover, as will subsequently appear, the contract between Englander and the Teamsters Local was in effect on February 14, the date when Griffin asserts she spoke to Moore, notwithstanding Sparrowk's claim that he did not sign it until February 15 or 16. Although the union shop provision contains a grace period before employees are required to become members of the Teamsters Local, the existence of the provision contributes plausibility to the testimony of Griffin and Moore concerning their respective con-

versations with Moore. In the light of the factors outlined above, I credit their testimony, and find that Englander interfered with, restrained and coerced employees in the exercise of rights guaranteed them by Section 7, thus violating Section 8 (a) (1), and contributed support to the Teamsters Local, in violation of Section 8 (a) (2), as a result of Moore's statements to Griffin on February 14 that as a condition of employment, she would "first have to get it straightened out with the Teamsters" and that she would have a job at the plant if she joined that organization; as a consequence of Henry's remark to McDonald on February 21 that he "would have to clear through the Teamsters"; and as a result of Moore's statement to McDonald on February 23 that the latter "would have to join the Teamsters," and the remark, "Well, I guess we can't do any business, that will be about it," with which Moore closed the interview with McDonald. The statement with which Moore ended the discussion with McDonald amounted to a denial of employment to the latter, although a job was available for him, because of his refusal to join the Teamsters Local. In addition to the violations of Section 8 (a) (1) and 8 (a) (2), resulting from Moore's statements to McDonald, as a consequence of the denial of employment to the latter, Englander unlawfully discriminated against him in violation of Section 8 (a) (3) of the Act.

Notwithstanding these findings, I am unconvinced by Rober's account of his alleged conversation with the two foremen. Early in his testimony, Rober imputed a statement to Henry on February

13, without any mention of Moore, that he would "have to join with the Teamsters" before he could be employed. At a subsequent point in his testimony, Rober quoted both Henry and Moore as telling him that "there would be a job on the shipping floor but I'd have to clear through the Teamsters." One is left in some doubt by Rober's testimony whether he intended to quote two separate conversations, one with Henry alone, in which the latter allegedly made the statement initially described above, and the other with both foremen, or whether it was the intendment of Rober's testimony that the statement he initially attributed to Henry was made during the alleged conversation with both foremen. In any event, Rober's imputation of a joint statement to both foremen has an artificial flavor, and upon my observation of Rober, I think it quite possible that he coupled Moore's name with that of Henry, in a statement he imputes to both, as an afterthought following the initial description by Rober of what he claims Henry said to him. In short, Rober's testimony lacks sufficient quality to warrant a finding that either Henry or Moore made the statements he imputes to them.

The remaining question is whether Englander and the Teamsters Local had a lawful right to enter into the agreement affecting the Seattle plant. In its brief, the Respondent Company bases its position that the agreement is lawful upon a claim, as the brief puts it, that "the agreement was not entered into until it was signed by Mr. John Sparrowk on behalf of the employer, on or about February 15, 1956, at which time the Teamsters had a

majority of the then employees and prospective employees.¹⁶ One may assume that a majority of the 92 non-supervisory employees on the payroll of the Seattle plant on February 15 had designated the Teamsters Local as their bargaining representative by that date,¹⁷ but that does not of itself establish

¹⁶ The assertion that the contract was "entered into" when Sparrowk signed it is not quite in accord with Sparrowk's testimony that "normally" Englander does not regard a collective bargaining contract as "binding" until it is signed by Korshak, and that Korshak's signature was not on the agreement with the Teamsters Local at the time Sparrowk signed it. As indicated earlier neither Englander nor the Teamsters Local produced any evidence as to the date of execution of the contract by Korshak.

¹⁷ Actually, the evidence does not probatively establish that the Teamsters Local represented a majority of the 92 non-supervisory employees as of February 15. At the hearing, the Teamsters Local offered in evidence approximately 60 signed applications for membership "that resemble" those Sparrowk states he examined on February 13. No evidence as to the authenticity of the signatures was offered, and they were excluded upon objection of the General Counsel. There is in evidence a document (G.C. Exh. 9) containing 90 signatures appended to a statement to the effect that the signatories agree to become members of the Teamsters Local upon entering Englander's employ. This was offered in evidence by the General Counsel and received without objection. Without exploring details of the number of signatures identified in the testimony, it may be noted that only a small proportion of them, far less than half, are authenticated in the evidence. The General Counsel, however, has advanced no claim that the signatures are not authentic.

the legality of the agreement, for there is good reason to conclude that the contract came into existence at some point prior to February 13, at a time when the parties thereto had no right to enter into it, notwithstanding Sparrowk's claim that he signed the agreement on February 15 or 16. A number of factors, set forth below, persuasively support that conclusion.

In that regard, one may first consider the document (G.C. Exh. 9) which Sparrowk asserts Williams submitted to him on February 15 in connection with the Teamsters Local's claim that it represented a majority of the employees at the plant. Each page of the instrument contains a typed paragraph followed by signatures. The document was maintained at the office of the Teamsters Local and submitted by that organization for the signatures of individuals, mainly former Craftmaster employees, who were seeking employment at the plant. The typed paragraph consists of the following:

"We the undersigned former employees of Craftmaster, Inc. do hereby agree to revoke any other Union representation in which I formerly participated as a member and do hereby accept as a new employee of the Englander Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company and do hereby agree to become a member of Warehousemen's Union Local 117 immediately upon going to work for the Englander Company."

There can be no doubt that the document, which is undated, was in existence at least as early as February 13, for various individuals signed it on that date. Significantly, it refers to "the contract in effect between the International Brotherhood of Teamsters and the Englander Company" (emphasis supplied). Thus it appears from the document at least that as of February 13 Englander was a party to an agreement affecting employees at the Seattle plant. To be sure, the quoted language literally refers to the "International Brotherhood of Teamsters," as being the other party to "the contract in effect," but the record, viewed as a whole, points to the conclusion that the contract to which the instrument has reference is the one between Englander and the Teamsters Local. On that score, in the first place, it is well to bear in mind that individuals concerned with union matters often loosely refer to local unions and their parent international organizations in such interchangeable and abbreviated fashion that one must frequently look to the full context of a given statement or situation to determine whether the reference is to a local or its parent. There is ample evidence of this practice in the testimony of some of the witnesses. One may note, incidentally, that the Respondent Union refers to itself in its contract with Englander as the "General Teamsters, Chauffeurs and Helpers Union, Local 117," whereas its name, as evidenced by other portions of the record, including its answer, is actually "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers

of America, Warehousemen's Local Union No. 117, AFL-CIO." There is no evidence that "International Brotherhood of Teamsters" is the name of any labor organization, but the quoted name is a part of the name of both the Respondent Union and its parent, the Teamsters International. If it be asserted that the relevant language of the document has reference to the Teamsters International, it is well to bear in mind that no claim is advanced in this proceeding either by the Respondent Union or the Respondent Company that there is, or ever has been, a contract applicable to the Seattle plant between Englander and the Teamsters International or, for that matter, between the company and any organization named the "International Brotherhood of Teamsters." The only agreement in evidence, affecting Englander's factory in Seattle, is that between the company and the Teamsters Local, and that contract recognizes the Teamsters Local, and not any organization named the "International Brotherhood of Teamsters," as the "exclusive bargaining agent" of the employees. Second, there is undisputed evidence that Bombardier, a representative of the Teamsters Local, told Testerman on February 10, when he asked her if she wished to come to work on February 13, that "they had a contract" at the plant. I have no doubt that Bombardier's meaning was that his organization, the Teamsters Local, had a contract with Englander affecting the plant. Bombardier's statement supports the conclusion both that the agreement between Englander and the Teamsters Local was in

effect as early as February 10, and that that is the contract to which the document signed by former Craftmaster employees has reference. Third, it will be recalled that Williams was present at the meeting of the Upholsterers Local on February 13 when members of that union were told that a telegram had been received from the president of the Upholsterers International to the effect that the members were "to go to work under the Teamsters' agreement, * * * but still remain members" of the Upholsterers Local. From the context of the description of the meeting, one may safely conclude that Williams said nothing there to negate the existence of "the Teamsters' agreement." The reference to "the Teamsters' agreement" at the meeting, standing alone, has, to be sure, a fragmentary character, but it takes on meaning when viewed in the full context of the record, including the evidence of the document signed by former Craftmaster employees and Bombardier's statement to Testerman on February 10, and the absence of any claim either by Englander or the Teamsters Local that the company has ever had a contract applicable to the Seattle plant other than the one with the Teamsters Local. In short, I am convinced that the document signed by former Craftmaster employees for the Teamsters Local, the statement made by Bombardier, and the summary of the telegram given in Williams' presence at the meeting of the Upholsterers Local, all had reference to the same contract; and that the agreement thus referred to is the one between Englander and the Teamsters Local.

Needless to say, the document maintained by the Teamsters Local, Bombardier's statement to Testerman, and what was said at the meeting of the Upholsterers Local, are not binding upon Englander and cannot be taken as evidence against it. However, as found above, on February 13, during a discussion at the Seattle plant, in reply to a remark by Evans to the effect that Williams was apparently acting as Englander's "personnel manager," Hunt, the factory manager at the Seattle plant, made the statement that "Williams had the right to call these people inasmuch as the Teamsters held an agreement with the Englander Company." This may not be dismissed lightly, notwithstanding Sparrowk's testimony that Hunt has no authority with respect "to matters involving negotiating with labor organizations," and irrespective of Sparrowk's assertion that Hunt's functions for Englander were still limited at the time of the hearing because of his work in "winding up Craftmaster." Whatever temporary limitations there may be on Hunt's work for Englander, one may assume from the fact that he has the title of factory manager that he occupies a position of substantial importance in the supervisory hierarchy at the plant. In that regard, it is well to bear in mind, also, that he was the only supervisor, in addition to Sparrowk, present during the discussion with the union representatives on February 13.

Hunt's statement takes on substantial importance as a guide to decision when viewed in the light of the whole record. A singular silence pervades the evidence as to the origin of the agreement. One

would assume that the signatories to a contract would be the individuals who are best in a position to know the facts of its origin. Yet Sparrowk, despite his position with Englander and the authority vested in him by the company, testified that he "doesn't know of any negotiation" of the contract"; and none of the other signatories were produced as witnesses either by the Teamsters Local or Englander. Substantially all that appears in the record on the subject of the origin of the agreement is hearsay testimony by Sparrowk, in which the latter quotes Chester Pink as telling him on the telephone from Chicago on February 6 that a contract signed by Dillon and Williams, "applying to the Seattle plant" was in Englander's Chicago office, and that it had been "sent or given to someone" there. Pink, it may be noted, was also not produced as a witness. In sum, there is no evidence that the contract was ever the subject of collective bargaining negotiations, at least in the accepted sense of participation in bargaining meetings and a discussion of contract terms.

The absence of such evidence; the unexplained failure of either of the Respondents to call Dillon, Korshak, Williams or Pink; the fact that the contract is little more than a duplicate of the one affecting the Los Angeles plant, even to the extent of bearing a date, October 1, 1955, some months prior to Englander's lease of the Seattle factory; Sparrowk's statements to Truman on January 26 that Englander has a "master agreement" of "nation-wide" scope with the Teamsters Interna-

tional, that he (Sparrowk) "was bound by the master agreement," that he did not wish to jeopardize "good working relations" in other Englander "plants covered by the Teamsters' agreements" by "signing this plant to another organization," and that he felt that if he did so, Englander "would be subject to reprisals by Teamsters in other locations"; and Sparrowk's refusal on February 3 to consent to an election because of the "master agreement", all point to the conclusion that the execution of the contract between the Teamsters Local and Englander was a mere formality, pursuant to some prior understanding between the company and the Teamsters International, and without regard to the question whether the Teamsters Local actually represented a majority of the employees at the Seattle plant. In the light of the factors enumerated above, I attach more weight to Hunt's spontaneous statement, made in a setting of dispute and controversy, than to Sparrowk's self-serving description of his alleged telephone conversation with Pink, of the claimed examination of the membership applications and the document signed by the employees, and of the date of his execution of the contract.

In sum, viewing the evidence as a whole, I find that the agreement under consideration was entered into at some point prior to Hunt's statement on February 13, and that it was in effect on that date.

As of February 13, Englander had only 14 non-supervisory employees on its payroll at the Seattle plant; there had as yet been little or no production

at the factory; the company contemplated a substantial expansion of its complement of employees; and the number then employed was but a small fraction of the anticipated work force. Bearing these circumstances in mind, it is immaterial that Sparrowk was "convinced" on February 13, as he claims, that the Teamsters Local represented a "majority of the labor pool that we were interested in" (plainly, from the context of the record, consisting for the greater part of individuals not yet in Englander's employ on February 13), or that the Teamsters Local on that date actually represented a majority of the relatively few individuals then employed. The decisive fact is that the contract was entered into and was in effect at a time when the number of individuals employed by Englander was far less than the number it anticipated hiring for its production needs. The Board has repeatedly held that a collective bargaining agreement between an employer and a union as the representative of the employees in a bargaining unit is ineffective if the agreement is made at a time when the number of employees is not representative of the employer's anticipated work force.¹⁸ In such circumstances, recognition of the union as the exclusive bargaining

¹⁸ *Daniel Hamm Drayage Co.*, 84 NLRB 458, enforced 185 F. 2d 1020 (C.A. 5); *Guy F. Atkinson*, 90 NLRB 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9) (The Court approved the principle set forth above); and *The Englander Company, Inc.*, 114 NLRB No. 160 (involving another plant of the Respondent Company).

representative of the employees in the unit constitutes unlawful assistance to the union.¹⁹

Applying these principles, and bearing in mind that the agreement was entered into at some point prior to February 13, I find that the contract is ineffective; and that by entering into and maintaining it Englander has contributed, and is contributing, support to the Teamsters Local in violation of Section 8 (a) (2) of the Act, and has thereby interfered with, restrained and coerced employees, and is interfering, restraining and coercing them, in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8 (a) (1) of the statute.

By the terms of Section 8 (a) (3) of the Act, a union shop provision such as that contained in the contract can be valid only if the labor organization involved was not "established, maintained or assisted by any action defined in Section (a) of this Act as an unfair labor practice" and "if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made." For the reasons stated above, the union shop provision in the agreement under consideration here does not meet the requirements of the statute and is invalid. Thus I find that by agreeing to the provision and maintaining it, Englander has discriminated, and is discriminating, in regard to the hire and tenure of employment of employees,

¹⁹ The Englander Company, Inc., *supra*.

in violation of Section 8 (a) (3), has contributed, and is contributing, support to the Teamsters Local, thereby violating Section 8 (a) (2), and has interfered with, restrained and coerced employees, and is interfering with, restraining and coercing them, in the exercise of rights guaranteed them by Section 7, thus violating Section 8 (a) (1); and that by agreeing to the union shop provision and maintaining it, the Teamsters Local has attempted, and is attempting, to cause Englander to discriminate against employees in violation of Section 8 (a) (3), thus violating Section 8 (b) (2) of the Act, and has restrained and coerced employees, and is restraining and coercing them, in the exercise of rights guaranteed them by Section 7, thereby violating Section 8 (b) (1) (A) of the said Act.²⁰

IV. The effect of the unfair labor practices upon commerce.

The respective activities of the Respondent Company and the Respondent Union set forth in Section III, above, occurring in connection with the operations of the Respondent Company described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor

²⁰ Among other cases, see *The Englander Company, Inc.*, *supra*; *The Great Atlantic & Pacific Tea Company*, 81 NLRB 1052; and *Acme Mattress Company*, 91 NLRB 1010, enforced 192 F. 2d 524 (C.A. 7).

disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

It has been found that the Respondent Company has engaged in unfair labor practices violative of Sections 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act, and that the Respondent Union has engaged in unfair labor practices in violation of Sections 8 (b) (1) (A) and 8 (b) (2) of the said statute. In view of the findings, I shall recommend that each of the said Respondents cease and desist from its unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent Company denied employment to Robert A. McDonald on February 23, 1956, and that its conduct in that regard violated Section 8 (a) (3) of the Act, I shall recommend that it offer the said Robert A. McDonald immediate employment in the position in which he would have been employed, but for the discrimination against him, or in a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and that the Respondent Company make the said Robert A. McDonald whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount of wages he would have earned, but for the said discrimination, between February 23, 1956, and the date of a proper offer of employment to him as aforesaid. Loss of pay shall be computed on the

basis of each separate calendar quarter or portion thereof during the period from the date of the denial of employment, as found above, to the date of a proper offer of employment. The quarterly periods shall begin with the respective first days of January, April, July, and October. Loss of pay shall be determined by deducting from a sum of money equal to that which Robert A. McDonald normally would have earned, but for the discrimination, in each such quarter or portion thereof, his net earnings,²¹ if any, in any other employment during that period. Earnings in one quarter shall have no effect upon the back pay liability for any other quarter. The Respondent Company will be required to preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of back pay due and his right of employment under the terms of the order recommended below.

On the basis of the foregoing findings of fact, and of the entire record in this proceeding, I make the following:

Conclusions of Law

1. The Englander Company, Inc. is an employer within the meaning of Section 2 (2) of the Act.
2. Upholsterers International Union of North

²¹ See *Crossett Lumber Company*, 8 NLRB 440, for the applicable construction of "net earnings."

America, AFL-CIO; Local 5 of Upholsterers International Union of North America, AFL-CIO; Washington-Oregon District Council of Furniture Workers, AFL-CIO; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO; and Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

3. By interfering with, restraining and coercing employees, as found above, in the exercise of rights guaranteed them by Section 7 of the Act, the Respondent Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By contributing support to the Respondent Union, as found above, the Respondent Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

5. By discriminating in regard to the hire of Robert A. McDonald, as found above, thereby encouraging membership in the Respondent Union and discouraging membership in other labor organizations, the Respondent Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By agreeing to and maintaining the terms of the union shop provision of its agreement with the Respondent Union, as found above, the Respondent Company has discriminated, and is discriminating,

in regard to the hire and tenure of employment of employees, thereby encouraging membership in the Respondent Union and discouraging membership in other labor organizations, and has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

7. By restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent Union has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

8. By agreeing to and maintaining the terms of the said union shop provision, as found above, the Respondent Union is attempting, and has attempted, to cause the Respondent Company to discriminate against employees in violation of Section 8 (a) (3) of the Act, and has thus engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that:

1. The Englander Company, Inc., its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Contributing support to International Broth-

erhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization;

(b) Giving effect to its contract with the Respondent Union, which agreement refers to that labor organization as the General Teamsters, Chauffeurs and Helpers Union, Local 117, or to any modification, extension or renewal of the said agreement;

(c) Recognizing International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, as the exclusive representative of a bargaining unit of its employees at its Seattle, Washington, plant, for the purposes of collective bargaining, unless and until the said Respondent Union is duly authorized, in conformity with law, to act as the exclusive bargaining representative of the employees in such unit;

(d) Discouraging or encouraging membership by any of its employees or applicants for employment in any labor organization by discriminating in any manner in regard to the hire, tenure of employment, or any term or condition of employment of employees;

(e) Entering into, maintaining, renewing, applying, or enforcing any agreement which requires employees or applicants for employment to be members of, join, or maintain membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ware-

housemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement conforms with the requirements of Section 8 (a) (3) of the Act;

(f) Making any statement to, or otherwise informing, any employee or applicant for employment that employment by it is conditioned upon approval or clearance by the said Respondent Union, or any other labor organization;

(g) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization; to form, join or assist labor organizations; to join or assist Upholsterers International Union of North America, AFL-CIO, Local 5 of Upholsterers International Union of North America, AFL-CIO, Washington-Oregon District Council of Furniture Workers, AFL-CIO, or Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities; except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Withdraw recognition from the Respondent

Union, whether known by the name of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or by the name of General Teamsters, Chauffeurs and Helpers Union, Local 117, or by any other name, as the representative of any employees for the purposes of collective bargaining;

(b) Offer to Robert A. McDonald, as set forth in Section V, above, entitled "The remedy", immediate employment in the position he would have held, but for the discrimination against him, or in a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole in the manner prescribed in the said section;

(c) Post at its plant in Seattle, Washington, copies of the notice attached hereto and marked Appendix A. Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board, shall, after being duly signed by the Respondent Company's representative, be posted by the said Respondent Company immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Respondent Company to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the said Regional Director in writing

within 20 days from the receipt of this Intermediate Report and Recommended Order what steps the Respondent Company has taken to comply therewith.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, its officers, agents, successors and assigns, shall:

(1) Cease and desist from:

(a) Giving effect to its contract with The Englander Company, Inc., which contract refers to it as the General Teamsters, Chauffeurs and Helpers Union, Local 117, or to any modification, extension or renewal of the said agreement;

(b) Entering into, maintaining, renewing, applying, or enforcing any agreement which requires employees or applicants for employment to be members of, join, or maintain their membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement conforms with the requirements of Section 8 (a)

(3), of the Act;

(c) Attempting to cause The Englander Company, Inc., or any other employer, to discriminate against any employees or applicants for employment in violation of Section 8 (a) (3) of the Act;

(d) In any other manner restraining or coercing

employees or applicants for employment in the exercise of the right to self-organization; to form, join, or assist labor organizations; to join or assist Upholsterers International Union of North America, AFL-CIO, Local 5 of Upholsterers International Union of North America, AFL-CIO, Washington-Oregon District Council of Furniture Workers, AFL-CIO, or Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities; except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Post in conspicuous places, including places where notices to members are customarily posted, at its usual membership meeting place, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board, shall, after being duly signed by an official representative of the Respondent Union, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps

shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material;

(b) Forthwith mail copies of the said notice marked Appendix B to the Regional Director for the Nineteenth Region of the Board, after such copies have been signed as provided in Paragraph 2 (2) (a) of these recommendations, for posting by The Englander Company, Inc., if it so agrees, at the places where it is required to post copies of the notice marked Appendix A, as recommended above;

(c) Notifying the Regional Director for the Nineteenth Region of the Board, in writing, within 20 days from the date of receipt of this Intermediate Report and Recommended Order, what steps the Respondent Union has taken to comply with the foregoing recommendations applicable to it.

It is further recommended that unless on or before 20 days from the receipt of this Intermediate Report and Recommended Order, the respective Respondents notify the said Regional Director in writing that they will comply with the foregoing recommendations respectively applicable to them, the National Labor Relations Board issue an order requiring the said Respondents to take the actions respectively required of them above.

Dated this 16th day of October 1956.

/s/ HERMAN MARX,
Trial Examiner.

APPENDIX A

Notice to All Employees: Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not contribute support to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization.

We Will Not give effect to our contract with the said International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or to any modification, extension or renewal of the said agreement.

We Will withdraw recognition from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, as the representative of any of our employees for the purposes of collective bargaining.

We Will Not discourage or encourage membership by any of our employees or applicants for employment in any labor organization by discriminating in any manner in regard to the hire, tenure of employment, or any other term or condition of employment of employees.

We Will Not enter into, maintain, renew, apply, or enforce any agreement which requires employees

or applicants for employment to be members of, join, or maintain membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement conforms with the requirements of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not make any statement to, or otherwise inform, any employee or applicant for employment that employment by us is conditioned upon approval or clearance by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization: to form, join or assist labor organizations; to join or assist Upholsterers International Union of North America, AFL-CIO, Local 5 of Upholsterers International Union of North America, AFL-CIO, Washington-Oregon District Council of Furniture Workers, AFL-CIO, or Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities; except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer Robert A. McDonald immediate employment in the position in which he would have been employed, but for our discrimination against him, or in a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he has suffered as a result of our discrimination against him.

THE ENGLANDER COMPANY,
INC.,
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, and to Employees of The Englander Company, Inc. Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies

of the National Labor Relations Act, we hereby give notice that:

We Will cease giving effect to our contract with The Englander Company, Inc., or to any modification, extension or renewal of the said agreement.

We Will Not enter into, maintain, renew, apply, or enforce any agreement which requires employees or applicants for employment to be members of, join, or maintain their membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, unless such agreement conforms with the requirements of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not attempt to cause The Englander Company, Inc., or any other employer, to discriminate against any employees or applicants for employment in violation of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not in any other manner restrain or coerce employees or applicants for employment in the exercise of the right to self-organization; to form, join, or assist labor organizations; to join or assist Upholsterers International Union of North America, AFL-CIO, Local 5 of Upholsterers International Union of North America, AFL-CIO, Washington-Oregon District Council of Furniture Workers, AFL-CIO, or Local Union 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; to bargain collectively through rep-

representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and to refrain from any or all such activities; except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO,

(Labor Organization)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

EXCEPTIONS OF RESPONDENT THE ENGLANDER COMPANY, INC. TO INTERMEDIATE REPORT AND RECOMMENDED ORDER OF EXAMINER HERMAN MARX

Respondent The Englander Company, Inc., excepts:

I.

To the Several Findings:

A. That any contract or working agreement existed between this Respondent and the Teamsters Union prior to February 15, 1956. (TXR 8, L 55 - TXR 9, L 58; TXR 10, LL 1 - 58; TXR 16, L 29, et seq.; TXR 18, L 10, et seq.; TXR 20, L 5, et seq.; TXR 22, L 32, et seq.)

B. That this Respondent had, or notified anyone that it had, a "master agreement" with the Teamster's Union which covered the Seattle plant (TXR 7, L 17, et seq.; TXR 13, L 47, et seq.; TXR 13, L 56 - TXR 14, L 1; TXR 22, L 38, et seq.)

C. That Sparrowk's real motivation for "referring" job applicants to the Teamster's Local was the "master agreement" with the Teamster's International. (TXR 13, L 45, et seq.)

D. That this Respondent's conduct in "referring" job applicants to the Teamster's Union constituted unlawful support in violation of Section 8 (a) (2), and unlawful interference in violation of Section 8 (a) (1). (TXR 17, L 8, et seq.; TXR 18, L 10, et seq.).

E. That at all times material since the dates of their respective employment, Henry. Hunt and Moore have been supervisors within the meaning of the Act (TXR 5, LL 20 - 36).

F. That this Respondent entered into an unlawful contract and at a time when the number of individuals employed was far less than the number it

anticipated hiring for its production needs. (TXR 23, L 10, et seq.)

G. That this Respondent, by entering into the contract, has been contributing and is contributing to the support of the Teamsters in violation of Section 8 (a) (2), and has interfered with and restrained and coerced employees, and is interfering, restraining and coercing employees in violation of Section 8 (a) (1). (TXR 23, L 22, et seq.)

H. That the Union Shop provision of the contract is invalid and by agreeing to it this Respondent has been violating and is violating Section 8 (a) (1), 8 (a) (2) and 8 (a) (3). (TXR 23, L 33, et seq.)

I. That this Respondent, through Moore and Henry, made unlawful statements to Griffin and McDonald in violation of Section 8 (a) (1), and contributed support to the Teamster's Union in violation of Section 8 (a) (2). (TXR 18, L 22—TXR 19, L 28.)

J. That this Respondent unlawfully denied employment to McDonald, in violation of Section 8 (a) (3) of the Act. (TXR 18, L 22—TXR 19, L 28.)

II.

To the Ruling by the Trial Examiner permitting the General Counsel to amend, at the start of the hearing, the complaint so as to include the charge concerning Robert A. McDonald (R 7-10), and to the admission of any evidence pertaining thereto. (R 356-364.)

III.

In the petition designated "The Remedy" TNR 24-11-1941

IV.

In the following Commissions of Law:

A. Commission Number 1, that by interfering with a strike and coercing employees this Respondent has acted and is acting in unfair labor practices within the meaning of Section 8 (a) (1) of the Act. TNR 24-11-1941

B. Commission Number 2, that by contributing support to Respondent Union this Respondent has acted and is acting in unfair labor practices within the meaning of Section 8 (b) (7) of the Act. TNR 24-11-1941

C. Commission Number 3, that by discriminating in regard to the use of M. I. and other procedures and policy in Respondent Union and its subordinate policy in other labor organizations, this Respondent has acted and is acting in unfair labor practices within the meaning of Section 8 (a) (3) of the Act. TNR 24-11-1941

D. Commission Number 4, that by seeking to undermine the terms of the Team Shop agreement this Respondent has discriminated and is discriminating in regard to the hire and terms of employment of employees thereby discriminating and acting in Respondent Union and its subordinate policy in other labor organizations, and has acted and is acting in unfair labor practices within the meaning of Section 8 (a) (2) of the Act. TNR 24-11-1941

V.

To the Recommended Order as made applicable to this Respondent (TXR 26, L 1—TXR. 27, L 21, and App. A).

VI.

To the Failure of the examiner to:

- a. Find and conclude that this Respondent has not violated the provisions of Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act.
- b. Recommend that the complaint be dismissed in its entirety as to this Respondent.

Respectfully submitted.

WALSH AND MARGOLIS.

Attorneys for Respondent.

The Englander Company, Inc.

[Title of Board and Causes.]

EXCEPTIONS OF RESPONDENT UNION.
LOCAL 117. TO TRIAL EXAMINER'S IN-
TERMEDIATE REPORT AND RECOM-
MENDED ORDER

Respondent Union excepts to the following findings of fact and conclusions of law:

1. To the finding that, sometime before February 15, when the Union represented a proper majority of the employees and when the contract between the Company and the Union was formally executed, the Union and the Company had given effect to that contract. (Page 20, lines 4, 5 & 6; page 22.

III.

To the portion designated "The Remedy" (TXR 24, LL 16-51).

IV.

To the following Conclusions of Law:

A. Conclusion Number 3, that by interfering with, restraining and coercing employees this Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (1). (TXR 25, LL 17-21.)

B. Conclusion Number 4, that by contributing support to Respondent Union, this Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act. (TXR 25, LL 23-25.)

C. Conclusion Number 5, that by discriminating in regard to the hire of McDonald, thereby encouraging membership in Respondent Union and discouraging membership in other labor organizations, this Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act. (TXR 25, LL 27-31.)

D. Conclusion Number 6, that by agreeing to and maintaining the terms of the Union Shop provision this Respondent has discriminated and is discriminating in regard to the hire and tenure of employment of employees, thereby encouraging membership in Respondent Union and discouraging membership in other labor organizations, and has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act. (TXR 25, LL 32-39.)

V.

To the Recommended Order as made applicable to this Respondent (TXR 26, L 1—TXR, 27, L 21, and App. A).

VI.

To the Failure of the examiner to:

a. Find and conclude that this Respondent has not violated the provisions of Section 8 (a) (1), 8 (a) (2), and 8 (a) (3) of the Act.

b. Recommend that the complaint be dismissed in its entirety as to this Respondent.

Respectfully submitted,

WALSH AND MARGOLIS,

Attorneys for Respondent,

The Englander Company, Inc.

[Title of Board and Causes.]

EXCEPTIONS OF RESPONDENT UNION,
LOCAL 117, TO TRIAL EXAMINER'S IN-
TERMEDIATE REPORT AND RECOM-
MENDED ORDER

Respondent Union excepts to the following findings of fact and conclusions of law:

1. To the finding that, sometime before February 15, when the Union represented a proper majority of the employees and when the contract between the Company and the Union was formally executed, the Union and the Company had given effect to that contract. (Page 20, lines 4, 5 & 6; page 22,

lines 33 through 50 and lines 57, 58 & 59; page 23, lines 7 through 14.)

2. To the various findings that (1) a sheet of paper which some new members of Respondent Union signed at the Union Hall, (2) a phone call made by a Union agent and (3) a telegram read at a meeting of another union, taken individually and collectively, prove that, as far as the Union is concerned, the contract in question was in effect before February 15. (Page 20, lines 36, 37 & 38 and lines 40, 41 & 42; page 21, lines 14 through 19, lines 23 through 28, and lines 40 through 52.)

3. To the finding on Page 22 that "In sum, there is no evidence that the contract was ever the subject of collective bargaining negotiations, at least in the accepted sense of participation in bargaining meetings and a discussion of contract terms." (Lines 27, 28, 29 & 30.)

4. To the finding on Page 23 that a union shop provision "such as that contained in the contract" is invalid unless certain conditions prescribed in the statute are met and that "the union shop provision in the agreement under consideration here does not meet the requirements of the statute and is invalid." (Lines 33 through 42.)

5. To the finding on Page 23 that "by agreeing to the union shop provision and maintaining it, the Teamsters Local has attempted, and is attempting, to cause Englander to discriminate against employees in violation of Section 8 (a) (3), thus violating Section 8 (b) (2) of the Act, and has restrained and coerced employees, and is restraining

and coercing them, in the exercise of rights guaranteed them by Section 7, thereby violating Section 8 (b) (1) (A) of the said Act.” (Lines 49 through 53 and lines 1 and 2 on Page 24.)

6. To conclusion of law No. 7—“By restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent Union has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.” (Page 25, lines 41, 42, 43 & 44.)

7. To conclusion of law No. 8—“By agreeing to and maintaining the terms of the said union shop provision, as found above, the Respondent Union is attempting, and has attempted, to cause the Respondent Company to discriminate against employees in violation of Section 8 (a) (3) of the Act, and has thus engaged, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.” (Page 25, lines 46 through 52.)

Respondent Union also excepts,

8. To the entire recommended order of the Trial Examiner, insofar as it affects Respondent Union, and to the recommended “Notice” for posting by Respondent Union (Pages 27 & 28, and Appendix B.)

Respectfully submitted,

/s/ RICHARD P. DONALDSON for
BASSETT, GEISNESS &
VANCE,
Attorneys for Respondent
Union, Local 117.

United States of America

Before the National Labor Relations Board

Case No. 19-CA-1306—The Englander Company, Inc. and Upholsterers International Union of North America, AFL-CIO, and Local 5 of Upholsterers International Union of North America, AFL-CIO and Case No. 19-CA-1307—Washington-Oregon District Council of Furniture Workers, AFL-CIO.

Case No. 19-CB-416—International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO and Washington-Oregon District Council of Furniture Workers, AFL-CIO.

DECISION AND ORDER

On October 16, 1956, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board ¹ has reviewed the rulings of the Trial

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.² The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:

1. We agree with the Trial Examiner that the Respondent Employer violated Section 8 (a) (2) and (1) of the Act by:

(a) Vice-president Sparrowk's referring of job applicants to the Respondent Union on January 11, 1956, for the purpose of discussing membership in that organization and, as part of such referral, furnishing some applicants with the address of the Respondent Union.

(b) Foreman Moore's statement to Griffin on February 14, 1956, that the latter would "first have to get it straightened out with the Teamsters" [Respondent Union] as a condition of employment and

² The Respondent Employer contends that it was prejudiced by the Trial Examiner's ruling permitting the General Counsel to amend the complaint to include an allegation respecting the discriminatory refusal to employ Robert A. McDonald.

The Trial Examiner gave the Employer an opportunity to apply for additional time to prepare its case against the McDonald allegation. The Employer did not do so. All of the issues were fully litigated at the hearing. In these circumstances we find no error in the Trial Examiner's ruling. Premium Worsted Co., 85 NLRB 985, enforced 183 F. 2d 258 (C.A. 4).

that she would have a job if she joined the Respondent Union.

(c) Foreman Henry's remark to McDonald on February 21, that the latter would have to clear through the Respondent Union as a precondition to receiving a job.

(d) Foreman Moore's statement to McDonald on February 23, that the latter would have to join the Respondent Union if he wanted a job with the Respondent Employer and when McDonald refused, Moore's saying, "Well, I guess we can't do any business."

2. We also agree with the Trial Examiner that the Respondent Employer and the Respondent Union entered into a collective bargaining contract at a time when the number of employees at work was not representative of the Respondent Employer's anticipated work force. By such conduct, the Respondent Employer rendered further unlawful assistance to the Respondent Union in violation of Section 8 (a) (2) and (1) of the Act.

The contract also contained a union security clause which was operative. By agreeing to and maintaining such a clause with an unlawfully assisted union, the Respondent Employer violated Section 8 (a) (3) and (1) and the Respondent Union violated Section 8 (b) (2) and (1) (A) of the Act.

Our finding that the respondents entered into a collective bargaining contract prior to February 14, 1956, which was before a representative number of employees had been employed, rests on the following evidence:

(a) In the autumn of 1955 and again on January 9, 1956, Dillon, a representative of the Western Conference of Teamsters, told the Respondent Employer's vice president Sparrowk that the Teamsters expected to have the Seattle operation under contract, the same as elsewhere in the country.

(b) At a plant meeting on February 13, 1956, that included representatives of the charging union, the Respondent Employer and the Respondent Union, Evans, a representative of the Furniture Workers remarked that Teamsters' representative Williams was apparently acting as the Respondent Employer's "personnel manager." Factory manager Hunt replied that Williams had the right to ask job applicants to come to the plant inasmuch as the Teamsters held an agreement with the Respondent Employer.

(c) Vice president Sparrowk testified that, on February 6, 1956, vice president Pink telephoned him from the Employer's Chicago, Illinois, headquarters, to say that a contract signed by representatives of the Respondent Union was in the office.

(d) On January 26, 1956, Sparrowk told Truman, a representative of the Brotherhood of Carpenters, that the Respondent Employer had a "master agreement" of nation-wide scope with the Teamsters International, that he did not want to jeopardize good working relations with the Teamsters by signing a contract for the Seattle plant with another union, and that he feared reprisals if he did so. Also, on February 3, Sparrowk refused Truman's request for a consent representation election to be

conducted by the Board because of a "master agreement" with the Teamsters.

(e) On February 10, 1956, Bombadier, a representative of the Respondent Union, telephoned applicant Testerman to ask her if she wished to go to work. Bombadier told Testerman that "they had a contract at the plant."

(f) As early as February 13, 1956, applicants for employment appeared at the Respondent Union's office and were asked to sign a document which recited that the signatory agreed to accept "all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company * * *"

(g) The absence of any evidence of contract negotiations between the Respondent Employer and the Respondent Union together with the fact that the contract in evidence is little more than a duplicate of the one covering the Respondent Employer's Los Angeles plant, even to the extent of bearing execution date, October 1, 1955, and effective date, December 1, 1955—dates prior to the acquisition of the Seattle factory.

3. Finally, we agree with the Trial Examiner, for the reasons stated in the Intermediate Report, that the Respondent discriminatorily refused employment to Robert A. McDonald in violation of Section 8 (a) (3) and (1) of the Act.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations

Act, the National Labor Relations Board hereby orders that:

1. The Respondent, The Englander Company, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Contributing support to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or to any other labor organization;

(2) Giving effect to its contract with the Respondent Union, (which agreement refers to that labor organization as the General Teamsters, Chauffeurs and Helpers Union, Local 117) or to any modification, extension or renewal of the said agreement, unless and until the Respondent Union shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of its employees at the Seattle, Washington, plant, and then only if the agreement otherwise conforms to the provisions of the National Labor Relations Act.

(3) Recognizing International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, as the exclusive representative of a bargaining unit of its employees at its Seattle, Washington, plant, for the purposes of collective bargaining, unless and until the said Respondent Union shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of the employees in such unit;

(4) Encouraging or discouraging membership in any labor organization by discriminating in any manner in regard to the hire or tenure of employment, or any term or condition of employment of employees;

(5) Entering into, maintaining, renewing, applying, or enforcing any agreement which requires employees or applicants for employment to be members of, join, or maintain membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement conforms with the requirements of Section 8 (a) (3) of the Act;

(6) Making any statement to, or otherwise informing, any employee or applicant for employment that employment by it is conditioned upon approval or clearance by the said Respondent Union, or any other labor organization;

(7) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from the Respondent Union, whether known by the name

of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or by the name of General Teamsters, Chauffeurs and Helpers Union, Local 117, or by any other name, as the exclusive bargaining representative of its employees at the Seattle, Washington, plant, unless and until the said labor organization shall have been certified as such representative by the National Labor Relations Board;

(2) Offer to Robert A. McDonald, as set forth in the section of the Intermediate Report entitled "The Remedy," immediate employment in the position he would have held, but for the discrimination against him, or in a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole in the manner prescribed in the said section;

(3) Post at its plant in Seattle, Washington, copies of the notice attached hereto and marked "Appendix A."³ Copies of such notice, shall, after being duly signed by the Respondent Employer's representative, be posted by the said Respondent Employer immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Rea-

³ In the event that this Order is enforced by a decree by the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing An Order."

sonable steps shall be taken by the said Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material;

(4) Notify the said Regional Director in writing, within ten (10) days from the date of this Order what steps it has taken to comply herewith.

2. The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, its officers, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Giving effect to its contract with The Englander Company, Inc., (which contract refers to it as the General Teamsters, Chauffeurs and Helpers Union, Local 117) or to any modification, extension or renewal of the said agreement, unless and until the Respondent Union shall have been certified by the National Labor Relations Board as the exclusive bargaining agent of Englander's Seattle, Washington, employees in an appropriate unit, and then only if the agreement to be given effect conforms to the provisions of the National Labor Relations Act;

(2) Entering into, maintaining, renewing, applying or enforcing any agreement which requires employees or applicants for employment to be members of, join, or maintain their membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement con-

forms with the requirements of Section 8 (a) (3) of the Act;

(3) Causing or attempting to cause The Englander Company, Inc., to discriminate against any employees or applicants for employment in violation of Section 8 (a) (3) of the Act;

(4) In any other manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Post in conspicuous places, including places where notices to members are customarily posted, at its usual membership meeting place, copies of the notice attached hereto and marked "Appendix B."⁴ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region shall, after being duly signed by an official representative of the Respondent Union, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material;

(2) Forthwith mail signed copies of the said notice marked "Appendix B" to the Regional Direc-

⁴ See footnote 3, *supra*.

tor for the Nineteenth Region for posting by The Englander Company, Inc., if it so agrees, at the places where it is required to post copies of the Notice marked "Appendix A."

(3) Notify the Regional Director for the Nineteenth Region of the Board, in writing, within ten (10) days from the date of this Order, of the steps it has taken to comply herewith.

Dated, Washington, D. C., July 17, 1957.

BOYD LEEDOM, Chairman
PHILIP RAY RODGERS, Member
STEPHEN S. BEAN, Member

[Seal] National Labor Relations Board.

APPENDIX A

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not contribute support to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization.

We Will Not give effect to our contract with the said International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or to any modification, extension or renewal of the said agreement, unless and until said labor organization shall have been certified by the Na-

tional Labor Relations Board as the exclusive bargaining representative of our employees.

We Will withdraw and withhold recognition from International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, as the representative of employees in our Seattle, Washington, plant for the purposes of collective bargaining unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of our employees.

We Will Not discourage or encourage membership by any of our employees or applicants for employment in any labor organization by discriminating in any manner in regard to the hire or tenure of employment, or any term or condition of employment of employees.

We Will Not enter into, maintain, renew, apply, or enforce any agreement which requires employees or applicants for employment to be members of, join, or maintain membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization, unless such agreement conforms with the requirements of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not make any statement to, or otherwise inform, any employee or applicant for employment that employment by us is conditioned upon approval of or clearance by International Brother-

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, or any other labor organization.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer Robert A. McDonald immediate employment in the position in which he would have been employed, but for our discrimination against him, or in a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he has suffered as a result of our discrimination against him.

The Englander Company, Inc.,
(Employer)

Dated

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Members of International Brotherhood of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, and to Employees of The Englander Company, Inc., Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We Will cease giving effect to our contract with The Englander Company, Inc., or to any modification, extension or renewal of said agreement unless and until we shall have been certified by the National Labor Relations Board as the exclusive representative of the employees of The Englander Company, Inc.

We Will Not enter into, maintain, renew, apply, or enforce any agreement which requires employees or applicants for employment to be members of, join, or maintain their membership in, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, unless such agreement conforms with the requirements of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not cause or attempt to cause The Englander Company, Inc., or any other employer, to discriminate against any employees or applicants for employment in violation of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not in any other manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed in Section 7

of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO,

(Labor Organization)

Dated

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: No. 15832. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. The Englander Company, Inc., and Warehousemen's Union Local 117, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent. Englander Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petitions For Enforcement and Petition For Review of An Order of the National Labor Relations Board.

Filed: February 17, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15832

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE ENGLANDER COMPANY, INC., and IN-
TERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, WAREHOUSEMEN'S LOCAL UNION
NO. 117, AFL-CIO,

Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent Company, The Englander Company, Inc., Seattle, Washington, its officers, agents, successors, and assigns and Respondent Union, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO, its officers, agents, successors and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "The Englander Company, Inc. and Upholsterers International Union of North America, AFL-CIO, and Local 5 of Upholsterers International Union of North America, AFL-CIO and Washington-Oregon District Council of Furniture, AFL-CIO; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO and Washington-Oregon District Council of Furniture Workers, AFL-CIO, Case Nos. 19-CA-1306, 19-CA-1307 and 19-CB-416, respectively.

In support of this petition the Board respectfully shows:

(1) Respondent Company is a Delaware corporation engaged in business in the State of Washington and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (c) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on July 17, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors and assigns and Respondent Union, its officers, agents, succes-

sors and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, finding of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent Company, its officers, agents, successors, and assigns and Respondent Union, its officers, agents, successors, and assigns to comply therewith.

/s/ STEPHEN LEONARD,

Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C. this 23rd day of December, 1957.

[Endorsed]: Filed Dec. 27, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT WAREHOUSE-
MEN'S UNION LOCAL 117 TO PETITION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS
BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

In answer to the Petition for Enforcement of an Order of the National Labor Relations Board, previously filed herein, Respondent Warehousemen's Union Local 117 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, admits, denies and alleges as follows:

(1) Answering paragraph (1) of the Petition, Respondent Union admits that it is a labor organization engaged in promoting and protecting the interests of its members in the State of Washington, within this judicial circuit, and that this court has jurisdiction of the Petition, but Respondent Union denies that it has committed any unfair labor practices.

(2) Answering paragraph (2) of the Petition, Respondent Union admits that on July 17, 1957, the National Labor Relations Board entered certain findings of fact and conclusions of law concerning alleged unfair labor practices of Respondent Union and that, on the same date, an Order was entered by the Board directing Respondent Union to cease and desist from the alleged unfair labor practices and to take other affirmative action and that copies of the foregoing documents were duly served upon Respondent Union.

(3) Answering paragraph (3) of the Petition, Respondent Union admits the same.

And, in further answer to the Petition, Respondent Union affirmatively alleges:

(4) The findings of fact entered by the Board are not supported by substantial evidence on the record before the Board considered as a whole.

(5) The conclusions of law entered by the Board are based upon erroneous and unsupported findings of fact and/or are incorrect as a matter of law.

(6) Assuming, *arguendo*, that the Board's findings of fact and conclusions of law are proper and correct, the scope of the Board's order has no reasonable relation to the offenses found, or to the likelihood of their recurrence.

(7) For the reasons stated in paragraphs (3), (4) and (5) the Board's order is null and void.

Wherefore, having fully answered, Respondent Union prays that this Court cause notice of the filing of this Answer to be served upon Petitioner,

and that this Court deny the Petition for Enforcement or order such other relief as the circumstances may require.

Dated: January 8, 1958.

/s/ SAMUEL B. BASSETT,
BASSETT, DAVIES & ROBERTS,

Attorneys for Respondent Warehousemen's Union
Local 117, affiliated with the International
Brotherhood of Teamsters, Chauffeurs, Ware-
housemen and Helpers of America.

[Endorsed]: Filed Jan. 10, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER AND PETITION FOR REVIEW OF
RESPONDENT THE ENGLANDER COM-
PANY, INC.

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Respondent The Englander Company, Inc., hereby answers the Petition for Enforcement heretofore filed by the National Labor Relations Board, and petitions for a review by this Court of the proceedings of the said Board and its order in this matter. Answering the allegations of the petition for enforcement, this respondent alleges:

I.

Answering paragraph (1) of the Petition, this respondent admits that it is a Delaware corporation, engaged in business in the State of Washington within this judicial circuit, and that this Court has jurisdiction of this Petition, but this respondent denies that it has committed any unfair labor practice.

II.

Answering paragraph (2) of the Petition, this respondent admits that the Board, on or about July 17, 1957, rendered its findings of fact, conclusions of law, decision and order, and that the same was served upon counsel for this respondent, but denies that said document and the proceedings upon which it was based are legal and valid.

Petition For Review

This respondent petitions this Court to review the Decision and Order of the National Labor Relations Board in the consolidated cases before it, designated Case No. 19-CA-1306, Case No. 19-CA-1307 and Case No. 19-CB-416, insofar as said Decision and Order was directed against this respondent.

I.

This petition for review is made pursuant to the provisions of subparagraph (f) of Section 160, 29 U. S. Code. The transcript which will be filed in connection with the Petition for Enforcement will be the same transcript as would be involved in this petition for review.

II.

The Decision and Order of the National Labor Relations Board is invalid and erroneous for the following reasons:

A. The findings of the Board are not supported by substantial evidence on the record considered as a whole.

B. This respondent did not commit any unfair labor practice.

C. The findings of the Board do not support the Conclusions of Law or Order which it entered against this respondent.

D. In any event, the order entered by the Board is without legal support.

E. The proceedings upon which the Order was based amounted to a denial of fundamental due process.

Wherefore, this respondent prays this Honorable Court that it cause notice of the filing of this answer and petition for review to be served upon petitioner National Labor Relations Board and respondent union; that the Order of respondent Board be reviewed and set aside, and that the Petition for Enforcement be denied.

WALSH & MARGOLIS,

/s/ By HARRY MARGOLIS,

Attorneys for Respondent The
Englander Company, Inc.

[Endorsed]: Filed Jan. 13, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT AND CROSS-PETITIONER THE ENGLANDER COMPANY, INC. INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

I. There is no substantial evidence to support the Board's finding that this respondent violated Section 8 (a) (2) and (1) of the Act by entering into a collective bargaining agreement with respondent union at a time when the number of employees at work was not representative of the anticipated work force or that this respondent otherwise rendered unlawful assistance to respondent union.

II. There is no substantial evidence to support a finding that this respondent violated Section 8 (a) (3) and (1) or that this respondent unlawfully assisted respondent union, or that this respondent was in violation of the law by agreeing to and maintaining a union-security clause in the contract.

III. There is no substantial evidence that this respondent violated Section 8 (a) (3) and (1) of the Act by discriminatorily denying employment to Robert A. McDonald by reason of his refusal to join respondent union.

IV. There is no substantial evidence that this respondent in any respect committed an unfair labor practice.

V. In any event, the findings of the Board do not support the order entered against this respondent.

VI. The proceedings upon which the Board's order was based amounted to a denial of fundamental due process.

Dated at Seattle, Washington, this 30th day of January, 1958.

WALSH & MARGOLIS,
Attorneys for Respondent and Cross-Petitioner The
Englander Company, Inc.

[Endorsed]: Filed Jan. 31, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, intends to rely upon the following points in this case:

I. Substantial evidence supports the Board's finding that respondent Company violated Section 8 (a) (2) and (1) of the Act by entering into a collective bargaining agreement with respondent union at a time when the number of employees at work was not representative of the anticipated work

force and by rendering other unlawful assistance to respondent union.

II. The Board properly found that since respondent union was unlawfully assisted, respondent company violated Section 8 (a) (3) and (1) and respondent union violated Section 8 (b) (2) and (1) (A) of the Act by agreeing to and maintaining a union security clause in their contract.

III. Substantial evidence supports the Board's finding that respondent company violated Section 8 (a) (3) and (1) of the Act by discriminatorily denying employment to employee Robert A. McDonald because of his refusal to join respondent union.

Dated at Washington, D. C., this 31st day of Jan., 1958.

Respectfully submitted,

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed Feb. 4, 1958. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1306

In the Matter of: The Englander Company, Inc.
and Upholsterers International Union of North
America, AFL-CIO, and Local 5 of Upholster-
ers International Union of North America,
AFL-CIO.

Case No. 19-CA-1307

The Englander Company, Inc., and Craftmaster,
Inc. and Washington-Oregon District Council
of Furniture Workers, AFL-CIO.

Case No. 19-CB-416

International Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers of America,
AFL-CIO, Warehousemen's Local Union No.
117 and Washington-Oregon District Council
of Furniture Workers, AFL-CIO.

TRANSCRIPT OF PROCEEDINGS

Room 407-G, United States Courthouse, Fifth
and Spring, Seattle, Washington, Tuesday, May 22,
1956.

Pursuant to notice, the above-entitled matter
came on [1*] for hearing at 10 o'clock, a.m.

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

Before: Herman Marx, Trial Examiner.

Appearances: Harry Margolis, Esq., of the firm of Walsh & Margolis, 301 Vance Building, Seattle, Washington, appearing on behalf of The Englander Company, the Employer. Melton Boyd, Esq., 407 U. S. Courthouse, Seattle, Washington, appearing as counsel for General Counsel. Samuel B. Bassett, Esq., New World Life Building, Seattle, Washington, appearing on behalf of Respondent, Warehousemen's Union, Local 117. Joseph D. Mladinov, 213 Floral Building, Tacoma, Washington, appearing on behalf of Washington-Oregon District Council of Furniture Workers, AFL-CIO. [2]

* * * * *

Mr. Boyd: I would, at the outset, ask leave to amend Paragraph 6, Roman 6, of the complaint, and will treat the answers to Paragraph VI as having been filed, to-wit, as amended, by particularizing that paragraph in adding the following sentence:

"On February 23, 1956, in further answer of these practices, plant superintendent, William Moore, offered employment to Robert A. McDonald, but conditioned the offer on the requirement that McDonald agree to join respondent Teamsters; McDonald did not agree to this condition, and respondent company refused to hire him." [7]

* * * * *

Mr. Margolis: I would like the record to show that the employer, The Englander Company, Inc., objects to it on the ground that the proposed amendment is untimely and injects a new element

of proof in the case at the start of the hearing.

Trial Examiner: I am perfectly prepared, gentlemen, to hear some specification of prejudice from you. That it is untimely may be so, but if you wish to demonstrate for me in what particular it is untimely I will hear you, in what [8] particular it is untimely, I will hear you.

Go ahead.

Mr. Margolis: Mr. Examiner, we are prejudiced to the extent that we have not been afforded the opportunity to investigate the truth or lack of truth of the charge. Had we had opportunity to investigate it, we certainly would have been in a position to bring in evidence to refute or possibly to admit the charge in our answer. So we have been prejudiced in that we have been deprived in effect of the opportunity to do either.

Trial Examiner: Anything else, Mr. Bassett?

Mr. Bassett: No, I have nothing further to add.

Trial Examiner: Well, that's a prediction which may or may not come true. If you wish to apply for time in which to investigate the matter and respond to it, upon the proper showing, such time will be given to you. At the present moment, however, it has not been shown that any prejudice to either respondent has resulted.

I am going to grant the amendment and grant the motion and permit counsel to make such application as counsel sees fit for time which may be necessary to prepare and to respond to the amended complaint. [9]

* * * * *

Mr. Margolis: Well, that is correct, Mr. Examiner. It is simply on the basis that at the commencement of the hearing we are apprised in effect of a new charge against the employer. I don't know what the union's position is, as to whether Local 117 is in position to refute it, but the employer certainly is not because we have not had the opportunity to investigate the allegation.

* * * * *

Trial Examiner: Right now there is an entirely different matter pending, with the understanding that you have grounded your objection solely upon the grounds you have indicated, you may have a standing objection. [10]

* * * * *

JOHN SPARROWK

a witness, called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [12]

* * * * *

Q. (By Mr. Boyd): And your place of business, Mr. Sparrowk?

A. My home office is in Oakland, California. We have a local business at 1964 Fourth Avenue South, in Seattle.

Q. And that local business operates in what name?

A. It operates under the name of The Englander Company, Inc.

Q. Your connection with The Englander Company is what?

(Testimony of John Sparrowk.)

A. I am now Vice-president of the Western Region.

Q. Relating your testimony to the circumstances that obtained in January and February of this year, what was your capacity with the company then?

A. I was General Manager of the Western Division at that time.

Q. And as such General Manager of the Western Division you had responsibility over what plants in addition to the Seattle plant?

A. Oakland and Los Angeles.

Q. The company has plants in how many states of the United States, if you know?

A. We have 15 bedding plants in existence plus ammunitions plant and a plastic plant and a steel operation in addition to that.

Q. With respect to the plant at Seattle, when was it acquired? A. January 16.

Q. And from whom was it acquired? [13]

A. From the estate of the late Kenneth Schoenfeld.

Trial Examiner: Is that January 16 of this year?

The Witness: Yes, sir.

Q. (By Mr. Boyd): And had that been an operating plant, and, if so, in what business name had it been operated prior to your acquisition?

A. The name prior to our acquisition was Craftmaster, Inc. They had been operating up to a short period of time before January 16.

(Testimony of John Sparrowk.)

Q. Without going into the detail, Mr. Sparrowk, when did you conclude your negotiations with the owner of Craftmaster, of the Craftmaster Corporation, for the plant, if it was prior to January 16?

A. It was after; in fact, substantially after; some of which is still going on, frankly.

Q. Let me put the question this way: when did you reach the tentative commitment to purchase the plant with relation to the date of January 16?

A. On January 16. We signed a lease and acquired some of the equipment. We were negotiating some of the inventory which has just been completed.

Q. In that regard you took over the equipment and the plant premises and some inventory, as I understand?

A. That is right. Some equipment. Some we elected not to.

Q. Did you assume in your contractual relationship with [14] Craftmaster to take over all their contractual undertakings? A. No, sir.

Q. And specifically did you assume to take over any labor contracts that it had had prior to its sale of its operations to you? A. No, sir.

Q. You were informed in the course of the transaction what labor contracts they had had prior to that time? A. Yes, sir.

Q. With what labor unions had they had contracts?

(Testimony of John Sparrowk.)

A. I think the Furniture Workers and the Upholsterers Union and the Teamsters Union. [15]

* * * * *

Q. When did you first appear personally at the plant? A. In December.

Q. And at that time what did you do about the plant?

A. At the invitation of Mrs. Schoenfeld I looked over the premises to report to my superiors.

Q. Directing your attention to the date of January 16, which by calendar reference appears to fall on Monday, may I inquire whether you were at the plant in the week preceding January 16?

A. Yes, sir.

Q. And when during that week did you appear at the Seattle plant?

A. I think the entire week.

Q. Was Craftmaster in operation during any part of that week? [16]

A. I don't know. I believe they were. I know they were the week previous.

Trial Examiner: That would be the week preceding January 7?

The Witness: Yes, sir.

Q. (By Mr. Boyd): Well, to aid perhaps in refreshing your recollection, do you know the date on which Craftmaster gave notice to its employees of their termination?

A. I believe I gave you some written data there.

Q. Do you have notes that you can refer to to refresh your recollection? A. Yes, sir.

(Testimony of John Sparrowk.)

Q. Will you get those and that will expedite things considerably. You have before you some notation to refresh your recollection? A. Yes.

Q. May I ask you, is that the last page under a caption headed, "Craftmaster-Englander dates"?

A. Yes, sir.

Q. Which is a copy of the last page of a letter you sent to our regional office? A. Yes, sir.

Q. Referring to that, if that will do so, to refresh your recollection, when was it that Craftmaster's production work was terminated? [17]

A. January 10.

Q. That was on a Tuesday, by reference to a calendar? A. Yes, sir.

Q. Can you state with reference to that date when it was that you personally interviewed prospective employees for employment by Englander Company?

A. Sometime during that week.

Q. Do you recall when in relation to the date of January 10? Did you do so while Craftmaster was still in operation? A. No, sir.

Q. Bearing in mind that it ceased its operations, its production operations, on the 10th, can you fix the date, day of the week, if not the calendar date, when you first interviewed employees?

A. All I can say in answer to that, it was during that week. It would be after the 10th.

Trial Examiner: It would be after the 10th, you say?

The Witness: Yes.

(Testimony of John Sparrowk.)

Trial Examiner: But it was during the calendar week?

The Witness: Yes, sir. [18]

* * * * *

Q. (By Mr. Boyd): I bring to your attention a letter bearing calendar date of March 12, 1956, shown to have been dictated on March 9, 1956.

A. Yes.

Q. And inquire, is this your signature on this letter? A. Yes.

Q. To this there was appended, and did you not transmit to us, a copy of the company's payroll list or seniority list under date of March 7, 1956?

A. Yes.

Q. And also did you not transmit to us under the heading, "Craftmaster-Englander Dates" the original of the document, a copy of which you have before you to refresh your recollection?

A. Yes, sir. [20]

Q. And did you not show on that that on January 11, in the afternoon, a picket line was placed by the Upholsterers Union? A. Yes, sir.

Q. Is it your best recollection that the Upholsterers Union did start picketing on the afternoon of January 11?

A. Yes, sir. But there was no identification on the pickets. It was something that was told to me; I did not verify it.

Q. Very well. Now, my inquiry was, previously was, this, up to the time that that picketing

(Testimony of John Sparrowk.)

started, although production had ceased, there were some employees working in the shipping room?

A. Yes, sir.

Q. Now bearing that fact in mind, that there were some employees working in the shipping room, when the picketing started, had your interviewing of employees—I am back to my first question—started at that time, of prospective employees?

A. Would you mind stating that again? I am sorry.

Q. Specifically and to put it directly, did you not begin the interviewing of employees, of prospective employees, on the morning of January 11, prior to the time the picketing started in the afternoon of January 11 by the Upholsterers Union?

A. I can't answer that because I don't know when the picketing started. I was in the building, when I come out for lunch I saw some pickets, I don't know, I am sorry. [21]

Trial Examiner: Before you went to lunch had you started interviewing prospective employees?

The Witness: I am not certain, sir. I talked to people at various times.

Mr. Boyd: We will develop it. This timing isn't too critical.

Q. (By Mr. Boyd): But with respect to the interviewing, you did do, where was it done and under what arrangement was it that you interview these people, Mr. Sparrowk?

A. Is it permissible for me to take exception to

(Testimony of John Sparrowk.)

wording? For example, interviewing is a term that I actually feel I did not do. I apprised the people with the fact that we were contemplating starting an operation. I told some of them as they came inquiring about jobs just exactly what our position is. I did not say we have such and such jobs open, I am considering you for such and such a job, so the word "interviewing" is disturbing to me. [22]

* * * * *

Q. (By Mr. Boyd): I want to thank you for the answer. I wanted the information you gave. What did you do and where did you do it?

A. I talked to approximately 15 or 20 people in the production office in the Upholstery Department at the request as to what is going to happen to me, people who had been terminated by Craftmaster who were seeking employment. After a while I decided I should have a phonograph record made, and I indicated rather than go through this with each individual we will have to approach this from some other way, because I did not have the time—at the time I was negotiating an inventory and so forth—to talk to 80 or 90 people on that basis, saying substantially the same thing.

Q. You say that this was in an office on the upholstery floor? A. Yes.

Q. Is that the lower or the second floor?

A. That is the second floor.

Q. That is the same floor that the shipping room is on?

A. Yes, sir, towards the back of the building.

(Testimony of John Sparrowk.)

Q. Under what circumstances was it that these people appeared there to listen to what you had to say, if not to be interviewed?

A. I would say voluntarily seeking employment. [23]

* * * * *

Q. Well, if it came to you dependably. You at that time had already decided to purchase the place, had you not?

A. No. We were in the process of negotiation. In addition to the shipping you mentioned there was certain inventory that was being taken and also equipment appraisal.

* * * * *

Trial Examiner: This is a separate party, isn't it, Craftmaster?

Mr. Boyd: This is not a successorship problem. [24]

* * * * *

Q. (By Mr. Boyd): Was your talking with the people in the office a consequence of these foremen telling you that these various applicants for employment wanted to talk with you?

A. Actually, no. It was as a result of my entry into the plant and people coming to me, what are we going to do, what are the plans; that is the basis on which I decided to talk to them.

* * * * *

Q. What did you tell them?

A. I told them that we were contemplating an operation in Seattle, that Mrs. Schoenfeld had

(Testimony of John Sparrowk.)

visited our principals in Chicago, learning of the fact that we had been looking at real [25] estate, that we expected to select a building, asking if we would consider their organization, building and so forth, because they were going out of business. At the time we were in the process of taking inventory that we had elsewhere in the country, plants where we had a different union arrangement than was in this plant, and that inasmuch as they were familiar with either the Furniture Workers or the Upholsterers or the Teamsters that they had—I suggested that they become acquainted with the contract of the other union so that they could decide which would be the best for them.

Q. Was that all of it, Mr. Sparrowk? Let's be more specific about what you did say to them with respect to the contracts.

A. I indicated to them that the Teamsters, Warehousemen, I understand it is indicated to Englander that their contract which they have in other plants would be a part of the Seattle operation. [26]

* * * * *

(The question was read as follows:

“Q. To restate it, what you said to these applicants for employment—if I am incorrect, you correct me—was that the Englander Company had a master contract with the Teamsters Union that would be applied to the Seattle plant?”)

Trial Examiner: All right, you may answer the question.

(Testimony of John Sparrowk.)

A. As near as I recall my statement was to them that we were told by the Warehousemen's Union that they would have our plant on the basis of what they had elsewhere, that their contract would be in existence here. I further stated to the employees that that would be a decision that they would have to make and suggested that they discuss it and find out what this union had to offer. I made the same statement on three successive [28] Mondays to a group of about 80 people collectively and told them very frankly that I was not in a position to tell them what they must do or they should do, that they would have to make the decision themselves. [29]

* * * * *

Q. (By Mr. Boyd): What contract does that local, Warehousemen's local, have with Englander Company at any place other than the contract that was made for this plant?

A. We have a similar contract at Los Angeles, Oakland, and other places in the country.

* * * * *

The Witness: You are speaking as of this date or as of January 11?

Q. (By Mr. Boyd): January 11.

A. We had no contract.

Q. You had no contract with Local 117 at that time? A. That is right.

Q. But you were saying to your prospective employees at that time that some Teamster body, if I may understand your answer, that some Team-

(Testimony of John Sparrowk.)

ster body was telling you that their contract with your company was going to apply to this plant?

A. Yes, sir, absolutely.

Q. That is the purport of your testimony?

A. Right. [30]

* * * * *

Q. Then how did you know that a Teamster agreement was to be made applicable to the Seattle plant?

A. We were told that; I was told that last November. [31]

Q. By whom?

A. When we were looking——

Trial Examiner: Give the witness an opportunity to finish, please.

Go ahead.

A. (Continuing) ——when we had selected a piece of property and was visiting with a builder, I was told that by a representative of the Western Conference of Teamsters, whose office is in San Francisco, who was apprised of the fact that I was in Seattle and indicated when you open that plant in Seattle we expect to have that plant on the same basis as we have your other plants.

Q. (By Mr. Boyd): What was the occasion for your talking with this representative of the Teamsters Western Conference in San Francisco? How did you happen to talk with him?

A. Well, he visits me regularly. He handles the contracts for Los Angeles—— [32]

* * * * *

(Testimony of John Sparrowk.)

A. (Continuing) —and Oakland. It was brought about, and he tried to contact me. He was advised by my office that I was in Seattle, and when I returned he said he wanted to get in touch with me for such and such a problem, "I understand you are in Seattle," and I said yes, we are doing so and so and so.

Trial Examiner: Do you know his name?

The Witness: Yes. Joseph Dillon.

Trial Examiner: Dillon?

The Witness: Yes.

Trial Examiner: Do you know his title?

The Witness: All I know he is with the Western Conference of Teamsters.

Q. (By Mr. Boyd): How did he know that you were negotiating for a Seattle plant at that time? A. I told him that.

Q. And then it was in response to your telling him that you were negotiating for a Seattle plant that he told you that your contract, that the contract with his organization, would apply in the Seattle plant?

A. He did not say that. He said, "We expect to have your Seattle operation under contract on the same basis that we have it elsewhere."

Q. With whom else with the Teamsters organization did you talk before you reached the place of interviewing the prospective [33] employees?

Mr. Bassett: Now, there is that word "interviewing". I thought we went through that all at once.

(Testimony of John Sparrowk.)

Mr. Boyd: The word "interviewing" is not a word of art.

Q. (By Mr. Boyd): I will withdraw the word "interviewing" and say before you talked with prospective employees on January 11.

A. Again I am trusting to my memory. That week I talked with Mr. Dillon, who was in Seattle, and Mr. Williams.

Q. Now, the Mr. Williams that you refer to is the gentleman seated here (indicating)?

A. Yes, sir.

Q. And who is secretary-treasurer of Local 117?

A. At that time I met Mr. Williams and Mr. Dillon.

Q. When in that week did you meet Mr. Williams? A. May I see a calendar again?

Q. Yes.

A. I would assume that it was possibly the 10th; prior to my talking to the people.

Q. And what agreement did you reach with him at that time?

A. Simply that the same thing that I stated to the people involved, that we didn't want any problem with anybody's union, that whoever could show us that they had the majority of the people represented by their union would be the people that we would do business with. [34]

* * * * *

Q. (By Mr. Boyd): Again adverting, Mr. Sparrowk, to your discussions or talk with these prospective employees, what did you tell them to do?

(Testimony of John Sparrowk.)

A. Mr. Boyd, I never tell the union to do anything, frankly.

Q. My inquiry was what did you tell the prospective employees to do at the time when you talked with them.

A. I told them to acquaint themselves with the facts so that they would be able to make a decision. I also told them that they could get these facts from Mr. Williams of the Warehousemen's Local 117.

Q. To be specific, did you not tell them to go and clear through the Teamsters Union?

A. No, sir.

Q. Did you not tell them to go up and sign up with the Teamsters? [35]

A. No, sir. I told them to go and get the information as to what they could do for them.

* * * * *

Q. (By Mr. Boyd): Did you in any instance in talking with the prospective employees, Mr. Sparrowk, on January 11 or January 12 tell them to go up and sign up with the Teamsters?

A. No, sir.

Q. But did you tell them, as you have testified before, that the Teamsters claimed that their contract would have application to this plant?

A. Yes, sir.

Q. Now, did you tell them that you expected that work would start on the following Monday, the 16th? A. Some yes and some no.

Q. That is, you told some—— [36]

(Testimony of John Sparrowk.)

A. (Interrupting) That we hoped to get started at that time, yes, sir. [37]

* * * * *

Q. (By Mr. Boyd): Continuing a little further with the date of January 11, Mr. Sparrowk——

A. Yes.

Q. (Continuing) ——on that day what other action took place that had relation to the prospective taking over of the plant by the Englander Company, specifically, was the inventorying of merchandise in process or manufacture begun on that date?

A. The entire inventory was begun on that date.

Q. On that date? A. Yes, sir.

Q. And to accomplish that inventory what personnel did you use?

A. Craftmaster. It was their inventory. They were to substantiate it to us. [38]

* * * * *

Q. Well, was it a matter of reputed knowledge to you that the Furniture Workers were picketing as well as the Upholsterers on the following day?

A. Yes; a Craftmaster employee, Ed Hunt, said those people, indicated to them, that they were Furniture Workers, yes.

Q. This Ed Hunt you speak of was manager of Craftmaster? A. Yes, sir.

Q. What is his connection with Englander at the Seattle plant?

A. I don't have the date. He is now factory manager for us.

(Testimony of John Sparrowk.)

Q. Was there any prior factory manager before him?

A. In this factory, no, sir. A sales manager—

Q. (Interrupting) Englander employed him as the factory manager? A. That's right.

Q. What position does Charles Moore now have with Englander Company?

A. May I correct that?

Q. Yes. A. I think it is Bill Moore.

Q. Bill Moore? A. Yes. [39]

Q. I do stand corrected.

A. As of last week he became plant superintendent. Prior to that time, from the date of hiring, he was foreman of the Upholstery and Mill.

Q. That had been his capacity with the Craftmaster plant? A. Yes.

Q. This man Henry, what is his present position with The Englander Company?

A. He is foreman of the shipping department.

Q. And that had been his position with Craftmaster? A. Yes, sir.

Q. And you mentioned one other foreman.

A. Henry Glenn, who was foreman of our Mattress Department. He had that position formerly with Craftmaster.

Trial Examiner: Excuse me a minute. On February 23, if you know, what position did William Moore hold with The Englander Company?

The Witness: He was foreman of the Upholstery and Woodworking Departments.

(Testimony of John Sparrowk.)

Trial Examiner: And, briefly, what were his duties?

The Witness: Well, they are varied. He supervises production and personnel of these departments and does purchasing of lumber only.

Trial Examiner: Were those his duties on February 23?

The Witness: Yes. [40]

Trial Examiner: Did he have the right to hire and fire personnel?

The Witness: Yes, sir.

* * * * *

Q. (By Mr. Boyd): Was there any other work being done in the plant at that time that looked forward to the operations that were to be begun by Englander? A. No, sir. [41]

* * * * *

Q. Now directing your attention to the balance of that week, being in this week in which January 10 and 11 fell, did the picketing continue through the balance of the week? A. Yes, sir.

Q. At the beginning of the week following was the picketing continuing?

A. My memory tells me it continued until mid-February. Whether it was every day I do not know, I wasn't there every day.

Q. Directing your recollection to the date of January 16, which was the Monday following—

A. Yes.

Q. (Continuing) —will you relate to us your recollection of what transpired on that morning?

(Testimony of John Sparrowk.)

A. I believe it is the Monday that I addressed about 80 people in the shipping department, prior to going down to the bank to [42] sign a lease and so forth.

Q. Very well. It was with reference to this same date of January 16 that some employees had been told that work might begin?

A. That is right. We were acquiring the plant that day, we hoped, if the figures were right and we wanted to start as soon as we can.

Q. Very well. Now, will you tell us, please, what you did tell the employees when you addressed this group of 80?

A. I told them that we were told by the Warehousemen's union that they would have this plant inasmuch as they have Englander factories elsewhere in the country and that evidence outside tells us that there is disagreement with that; that as far as I was personally concerned I did not want us, that is, The Englander Company, to have any problem with any union, whether it was the Teamsters, the Furniture, or Upholsterers Union; I would like to say to you more, I would like to tell you to come to work because I know you have been off of work a great bit since Thanksgiving but that is something I cannot tell you, it has to resolve itself, and we are not going to start out with problems with any union. A lot of people came to me individually and said could I do so and so and so; I indicated to them my feeling, that unfortunately they were in a bind. They wanted to come to work

(Testimony of John Sparrowk.)

and we wanted to start this operation, but we had this problem, that until it was resolved I didn't [43] know what I could do. [44]

* * * * *

Q. Did you not disclose to the assembled employees that you had heard of this agreement being made in the East?

A. I heard that—I had had rumors of all kinds of things taking place, but I did not specifically indicate, to my recollection, that somebody said go ahead and do something. I wasn't satisfied enough to open the plant, let's put it that way.

Trial Examiner: Satisfied with what?

The Witness: With the fact that anybody had the membership sufficient that I could open the plant and recognize them as being a representative of the employees.

Trial Examiner: Did you say anything about that to the people who were assembled there?

The Witness: I indicated to them——

Trial Examiner: Tell us what you said, please.

The Witness: I said to them that we are told by three different unions that they are to have representation in this plant. We are told by one that arrangement has been made with [45] an International of another that they could have or should have jurisdiction here. Frankly, I am not convinced that they know what they are talking about. That was my statement to them. [46]

* * * * *

Q. (By Mr. Boyd): At the conclusion of that

(Testimony of John Sparrowk.)

meeting what action did you take to inform them of what to do or what they might expect?

A. Well, my closing statement, frankly, was one that was sort of an after-thought, after I got ready to go back in the office—I had worked my way towards the door—was to the effect that this is rather strange, anyway, because actually we haven't bought anything yet, that I have an appointment to go with some other people to the bank to acquire something, so we might be in business; if that didn't work out, why, all the problems we were anticipating weren't going to be in existence. [47]

* * * * *

Q. When did you sign the papers?

A. We signed it on the 16th.

Q. How long after that meeting?

A. I think our appointment was 1 o'clock. [48]

* * * * *

Q. (By Mr. Boyd): Let's be specific—— [49]

A. Yes.

Q. (Continuing) ——what did you do when you signed the papers at the bank between 1 and 2 o'clock, what did you sign?

A. We signed a lease after some modification, some provisions that our counsel advised us that should be in there that was not in the original lease. We acquired some machinery, some we elected not to accept, and we officially bought two pages of inventory and established a formula for evaluating the balance of the inventory.

(Testimony of John Sparrowk.)

Q. And you did that all on the afternoon of the 16th?

A. That is right, at the Seattle First National Bank.

Q. On that same day did you have any negotiations with the Teamsters Union, Local Union 117?

A. Negotiations, no. I had a conversation.

Q. And with whom?

A. With Williams, Bill Williams.

Q. At what time of the day was it you talked with Mr. Williams? A. Late in the afternoon.

Q. And where was that conversation?

A. Over the telephone.

Q. You were where?

A. I was back at the plant at that time.

Q. And was your conversation with him only a telephone conversation?

A. In direct answer to a question that he asked me. [50]

* * * * *

Q. What was the question of Mr. Williams and what was your answer?

A. "Did you make a deal with Craftmaster?"

Q. And what was your answer? A. Yes.

Q. And then what further developed in the conversation? A. That was all. [51]

* * * * *

Q. (By Mr. Boyd): In your last statement when you said this is the contract you received at your Oakland office, you were referring to this document (indicating), which I shall now have

(Testimony of John Sparrowk.)

marked for identification General Counsel's Exhibit No. 2.

* * * * *

Q. (By Mr. Boyd): Do I understand your testimony, Mr. Sparrowk, that you received this at your Oakland office for the first time on what date?

A. I do not know. It was sometime well after January 16, I do know that, but when I do not know.

Q. Are you prepared to say whether it had been received at your Oakland office prior to the stamp date thereon of May 18? A. Yes, sir.

Q. It had been received prior to that date?

A. Yes, sir.

Q. What is the significance, then, of the stamp date on there? [55]

A. Normally these come in a confidential envelope addressed to me. At a request in a telephone conversation I made to our office asking for the Seattle contract, this was forwarded to me in an air-mail envelope which was not marked confidential. It was opened in our Oakland office. This was received May 18, 1956, the same day I received your telegram asking me to be sure and bring the signed copy of the contract. All of our mail is stamped in our office.

* * * * *

Q. And I understand from your prior testimony that General Counsel's Exhibit 2 had been in your possession prior to May 18.

(Testimony of John Sparrowk.)

A. You tell me what Exhibit 2 is, please.

Q. Right there (indicating). A. Yes, sir.

Trial Examiner: Referring to General Counsel's Exhibit [56] No. 2.

Q. (By Mr. Boyd): When had you signed this document (indicating)?

Trial Examiner: Referring to G.C. 2.

A. Mr. Boyd, I will have to give you pretty much the same answer that I gave you when you asked me the question early in March. I signed it sometime in Oakland in February; I don't know when.

Q. (By Mr. Boyd): In February?

A. My instructions were that if and when the union involved showed us that they had a representative group of the people, then we were to consider the contract and to do business with them. If they did not present that proof, then there was to be no contract.

Q. I am referring now to General Counsel's Exhibit No. 2, which you say you signed in February.

A. Yes.

Q. From whom did you receive it?

A. I received it from Chester Pink. It was in my mail on one of the trips I—upon my return from one of my trips to Seattle it was in my mail.

Q. Where is the transmittal memo that transmitted this document to you?

A. There is no transmittal memo. I talked to him frequently on the phone. He said, "I am sending this to you, when the [57] time is right for

(Testimony of John Sparrowk.)

signature, I will send it." He said, "Shall I send it to Seattle or Oakland?" I said, "Send it to Oakland because we are mixed up here." [58]

* * * * *

Q. (Interrupting) I hand you here a document marked General [68] Counsel's Exhibit No. 5.

* * * * *

A. I gave you this contract, indicating that this is the contract that we have in existence in Los Angeles and is the contract that we have in existence in Seattle, with the exception that I removed the last page, which had something to do with a wage thing that applies to Los Angeles and did not apply [69] to Seattle.

Trial Examiner: The witness has been referring to something which has been marked G.C. 5 for identification.

A. This (indicating) is a copy of the contract that we have with Warehousemen's Local 117. I gave it to you at the time I was at that meeting.

* * * * *

Q. (By Mr. Margolis): Mr. Sparrowk, referring to Exhibit G.C. 5, now, when was it, approximately, that you produced this for Mr. Boyd's inspection, approximately?

A. Sometime in March, I would say. Is that—

Q. (Interrupting) Well, as best as you recall. Sometime in [70] March? A. Yes.

Q. What did you tell him with reference to what this document was at that time?

A. I told him that was the same type of con-

(Testimony of John Sparrowk.)

tract that we had in Los Angeles and Seattle.

Q. The same type of contract?

A. That is right. I pointed out in Los Angeles there is a page that has been removed that has some other factors to it, that we have a different participation, health and welfare, and other things in various places, and that is the basis of it.

Q. This was not represented to Mr. Boyd, then, as being a copy of the Seattle or any particular contract because it was not, is that correct?

A. That is right, because it was not filled in.
* * * * * [71]

Q. (By Mr. Boyd): And it was in connection with that that I pointed out to you that this was not a master agreement but was a pattern form? Do you remember our discussion of that? [73]

A. Yes, that is right.

Mr. Margolis: We concur in counsel's legal conclusion.

Trial Examiner: Well, the witness has.
* * * * *

Q. (By Mr. Boyd): Now, with this refreshment of your recollection of the detail, can you at this time state specifically when it was that you signed for the first time an agreement with Warehousemen's Local 117?

A. By simple deduction and trying to ascertain where I was at various times, knowing that the document was in Oakland, I can come comparatively close to the date. I would pinpoint a date, but, frankly, it is a close estimate.

(Testimony of John Sparrowk.)

Trial Examiner: Let's have it.

The Witness: I would say approximately the 15th of February.

Q. (By Mr. Boyd): Where were you when you signed it? A. I was in Oakland.

Q. You now have reference to the document which was marked for identification General Counsel's Exhibit No. 2? A. Yes, sir. [74]

Q. Where in Oakland were you when you signed it? A. In my office.

Q. Who else signed it in your office?

A. Nobody else.

Q. By whom had it been signed before you signed it?

A. W. L. Williams and Joseph Dillon.

Q. From whom had you received it?

A. I had received it in the mail from Chester Pink.

Q. Did you have a transmittal memo that accompanied it? A. No, sir.

Q. What explanation had you had of this document, General Counsel's Exhibit 2?

A. I had had a phone conversation with Mr. Chester Pink when he indicated to me that he was going to send the contract to me, wanted to know if he should sent it to Seattle or Oakland, I indicated Oakland, with the instructions that when somebody had the majority that we could enter into a contract, but until every union indicated that to us, and until I was convinced that one had the majority I was not to sign.

(Testimony of John Sparrowk.)

Trial Examiner: About how long before you signed that contract did you have that conversation?

The Witness: I would say of the week beginning February 6, because I was in Seattle prior to the 13th, so it was during that week that I had the conversation with him.

Q. (By Mr. Boyd): During the week of February 6 you had the [75] conversation with——

A. Mr. Pink. Then I returned to Oakland, I believe, on February 15, taking a plane, I think, that got me in there at 4:55 or something like that, which I normally take. I went to my office. I was coming back up here almost immediately. That is why I feel that is the date.

Trial Examiner: Did Mr. Pink in words or substance tell you, when you spoke to him on the telephone, that a contract with Local 117 had been signed by any union officials?

The Witness: Yes, sir, he indicated to me that he was forwarding me a contract that had been submitted to him by the Warehousemen's 117, no, by the Warehousemen Teamsters, with the signatures on it of Mr. Dillon and Mr. Williams.

Trial Examiner: Did he tell you in substance when he had received that contract?

The Witness: No, sir. He cautioned me not to affix my signature until I was convinced that they had a majority.

Q. (By Mr. Boyd): What did you do to convince yourself that they had a majority?

(Testimony of John Sparrowk.)

A. I looked at some applications for membership that was given to me by Mr. Williams, and I counted them. I did not scrutinize them to every one to ascertain who they were and what they did and so forth. If my memory serves me correctly, and again it is a question of memory, I believe at the time there were someplace in excess of 60 signatures that I looked at. [76]

Q. On this document? Was it a single document?

A. No. It was individual sheets of paper.

Q. A number of cards?

A. Sheets of paper.

Trial Examiner: Let's have some dates here, Mr. Boyd——

Mr. Boyd: Pardon?

Trial Examiner: I think the time, for the benefit of all concerned, should be developed.

Q. (By Mr. Boyd): When did you do this?

A. I was in Seattle continuously after the 7th or 8th of February up until the 15th. It was during that period. It may have been—the exact date I am not sure.

Q. Well, can you fix it in relation to the time when you had your telephone conversation with Pink?

A. Yes. It was after I talked with Chester Pink because when I talked to Chester Pink I indicated that I was not convinced that anybody had representation. In fact, I told him that I had had conversation with Mr. Truman that very week indicat-

(Testimony of John Sparrowk.)

ing to him that if he had representation of the thing that I had no objection to his union being in the factory, and at that time—well, that is not relevant. [77]

* * * * *

Q. Had you talked with Mr. Pink before or after you talked to Mr. Truman?

A. I talked to him afterwards because I told him of this situation, and again he cautioned me to be very careful not to enter into anything until I was certain that there was sufficient representation to warrant the union's contractual arrangement.

Q. And the time when you examined these cards, individual cards, in the possession of the Teamsters Union, you now fix, according to your best recollection, on what date?

A. Between the 9th and the 14th, I would say.

Q. Between the 9th and the 14th?

A. Or the 10th and the 14th.

Q. Were you in Seattle on Friday, the 10th, and through that week end and until the following Tuesday, the 14th? A. Yes, sir.

Trial Examiner: Had you already received a copy of the contract, General Counsel's 2?

The Witness: No; that was in my Oakland office, undoubtedly, but at that time I didn't have it in my possession.

Trial Examiner: I take it you were up here and not down there, you hadn't gone down there?

The Witness: That is right.

(Testimony of John Sparrowk.)

Q. (By Mr. Boyd): How many of the cards did you count?

A. In excess of 60. I don't remember the exact number, but [79] there was over 60. I can't recall the exact number.

Q. And where was it you examined these cards?

A. I examined these cards at the premises on Fourth, South.

Q. At what?

A. At the former Craftmaster——

Q. At your plant?

A. At our plant, at that time.

Q. And in whose possession were the cards at the time you examined them?

A. They were in the hands of Mr. Williams. [80]
* * * * *

Trial Examiner: Now, would you be good enough to tell me what you did with these cards?

The Witness: I merely looked at them and handed them back to Mr. Williams. They were not my property. They were application forms for membership in the Warehousemen's Union.

Trial Examiner: Did you do anything to verify the fact of employment of any of these individuals by the company?

The Witness: Yes. I did not physically go down the list but by this time I was familiar with some names. I had gone over a list of former Craftmaster employees, and I was convinced of the fact that in my mind this represented a labor pool that was available to us for that plant.

(Testimony of John Sparrowk.)

Trial Examiner: My question is this, how many individuals on that list or on these cards did you know as a fact, at that time, as a fact, to be in the employ of The Englander Company?

The Witness: None. Maybe four or five. At that particular time—well, I will take that back. There were probably of that maybe 15 or 20, but the balance were people that we were interested in because they had had experience in our type of operation.

Trial Examiner: Now, these 15 or 20, were they actually in the employ of The Englander Company at that time?

The Witness: I have dates as to how many employees we had at that time, Mr. Marx. I am not sure that it is 15 or 20. [81] By February, if it was the 10th or 13th, I cannot tell you whether we had 10, 20, or 30. I think we have some information on that here.

Mr. Boyd: Before doing that may I exhaust the witness' recollection?

Trial Examiner: Just a moment, please. In a moment.

What I am trying to find out is this, at the time when you looked at these cards, did you know as a fact that any of these employees were in the employ of Englander Company?

The Witness: Yes.

Trial Examiner: And, if so, how many?

The Witness: I think I will need a list of our employees to know how many employees we had at that time.

(Testimony of John Sparrowk.)

Mr. Margolis: May I furnish the witness with this list?

Mr. Boyd: Before that is furnished I would like to pursue questioning him on his own recollection.

The Witness: May I add this while he is bringing it: they were either employed by us or potential employees, because they had a background in the potential work that we had.

Trial Examiner: Before you look at that, please, before you look at it——

The Witness: Yes.

Trial Examiner: What I am trying to find out, and perhaps I haven't made myself clear — if you don't understand me, please let me know — at the time you looked at these cards how many [82] individuals on the cards, reflected on the cards, did you know at that time to be in the employ of The Englander Company?

The Witness: I am not able to give you a number other than to say most of the few employees that we had. It may have been all. I did not sit down and say this man is on our payroll, is he a member and so on and so and so. I was convinced the people I had talked to who indicated a desire to come to work for Englander when we went to work were represented in that list of employees.

Trial Examiner: Have you anything in your possession now which would help you refresh your recollection as to how many employees you had in The Englander Company at the Seattle plant on that date when you looked at the cards?

(Testimony of John Sparrowk.)

The Witness: Yes, sir.

Trial Examiner: Would you refer to it and tell me how many?

The Witness: May I ask one question?

Trial Examiner: I just want the number.

The Witness: I assume we are referring to people who were normally covered by a negotiated contract, excluding supervisors and office personnel.

Trial Examiner: Exclude all supervisory and office personnel.

Mr. Margolis: And, Mr. Examiner, I wonder if you could give the witness a clue as to which date you refer to, because we have had a wandering date in the past. [83]

Trial Examiner: No, we haven't now. We have a very exact specification of the date, whenever it was, when he looked at these cards.

Mr. Margolis: The reason I bring that up, Mr. Examiner, is that the payroll was developing rather rapidly at that time and constantly changing from day to day.

Trial Examiner: I have had no indication from the witness that he has any doubt about my question, what it refers to.

Mr. Margolis: All right, sir.

Trial Examiner: I framed it with the thought in mind of referring to the date when he looked at the cards.

The Witness: If this was prior to February 13, which is one of the dates in question, we had eight employees in the production phase of the business,

(Testimony of John Sparrowk.)

and I would say of that probably a half dozen of them were represented in this group.

Trial Examiner: Now, if I may understand you correctly on the date, whenever it was, when you looked at these cards, you had some eight production employees on the Englander payroll in Seattle and about a half dozen of those eight were represented in these cards you looked at?

The Witness: Yes.

Trial Examiner: All right, sir. [84]

* * * * *

Q. (By Mr. Boyd): You have been in operation, Mr. Sparrowk, at the Seattle plant since what date? A. Mid-February.

Q. And at what time, if at all, did you attain what you deem substantially full production?

A. In the Mattress Department almost at once. * * * * * [87]

Mr. Margolis: In order to dispense with the need for proof on this point I offer to stipulate as follows:

That the respondent Englander Company, Inc., from the date it commenced operations up to the present time has shipped out of the State of Washington from its Seattle plant merchandise in excess of \$50,000 sales price.

Mr. Boyd: With that proposal I would be content and I would agree to that as a stipulation and would not pursue any further inquiry concerning jurisdiction, other than those matters which are pleaded and admitted.

Mr. Bassett: Respondent union accepts that. [89]
* * * * *

Trial Examiner: On the record.

During the off-the-record discussion the respondent union's counsel has indicated, so indicated, that he will admit the allegations of the first three sentences of Paragraph 1 of the complaint.

Am I correct, sir?

Mr. Bassett: That is correct, Mr. Examiner. [90]
* * * * *

JOHN W. TRUMAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name and place of business is where?

A. My name is John W. Truman. My place of business is the general office of the United Brotherhood of Carpenters and Joiners of America, Indianapolis, Indiana.

Q. What is your employment with them?

A. I am a representative of the Brotherhood.

Trial Examiner: An international representative?

The Witness: Yes, sir. [92]

Q. (By Mr. Boyd): Mr. Truman, what, if any, responsibility have you had with respect to the matters inquired of Mr. Sparrowk?

A. I was assigned to this case by our Interna-

(Testimony of John W. Truman.)

tional office on January 20, 19 or 20, to confer and work with the Furniture Workers Local Union 3197 and the Washington-Oregon District Council of Furniture Workers.

Q. That was on January 19 or 20 of this year?

A. Yes, sir.

Q. With whom, if anyone, did you have conversations who were connected with The Englander Company? A. Mr. Sparrowk.

Q. When was your first conversation with Mr. Sparrowk?

A. May I refer to my notes here?

Q. If you have notes that you kept at that time that will refresh your recollection, I would ask you to look at them, only to refresh your recollection.

A. On January 26.

Q. Where did you talk with Mr. Sparrowk?

A. At the plant.

Q. By reference to the calendar that fell on Thursday? A. Yes.

Q. Were you accompanied by anyone at the time? A. No, sir.

Q. Was he alone or was there someone with him at the time you were talking with him? [93]

A. Mr. Hunt was in there most of the time, I believe.

Q. That is Mr. Ed Hunt? A. Yes.

Q. Will you relate to us in detail your conversation with Mr. Sparrowk on January 26?

A. I told him that we represented the people in the Millroom, shipping room, receiving room, and

(Testimony of John W. Truman.)

had since 1936 in that particular plant, and asked him if them buying the plant had they taken over the contract that was in existence between the Furniture Workers Local and the Craftmaster Company, and he said they had not. I told him that we still represented those people and pointed out to him that they were competent from prior experience in the plant. He informed me that he would like to have all of the millroom crew back with the possible exception of one or two, I believe he said, who were older men; at the same time he pointed out other older men that he wanted back. At that time there was some work being done in the building——

Q. (Interrupting) Do you know the nature of the work that was being done on that date, January 26, in the building?

A. I believe it was moving benches, reconstruction, and so forth, getting ready to institute their particular line of work.

Trial Examiner: This was maintenance work that was being carried on?

The Witness: I believe it would come under the category [94] of maintenance work, yes, sir.

Q. (By Mr. Boyd): Did you have opportunity to observe how many employees they had there at that time?

A. Not exactly, sir. I didn't go through the plant. I believe Mr. Sparrowk told me there were four or six in the plant.

Q. Now, will you proceed with your discussion

(Testimony of John W. Truman.)

with Mr. Sparrowk. Was there more that was mentioned?

A. Yes. In our discussion he told me that The Englander Company nation-wide was under agreement to the Teamsters through a master agreement that had been negotiated between a Mr. Hoffman of the Teamsters International, a Mr. Kroshak, an attorney in Chicago, and a Mr. Pink, who was in charge of all labor negotiations for the company.

Q. Did he inform you when that agreement had been negotiated? A. I don't believe so.

Q. That name that you gave of the attorney in Chicago, what is your recollection of it?

A. It was a Mr. Kroshak. He gave me the man's name and phone number in the event I wanted to get in contact with him.

Q. Did he give you the name of Sidney R. Korschak, K-o-r-s-h-a-k? A. That is the name.

Q. Now, proceed.

A. I pointed out to Mr. Sparrowk that we had had very friendly relations with the Craftmaster Company; this was borne [95] out by Mr. Hunt, who was present. I believe Mr. Hunt was present at that time.

Trial Examiner: What did Mr. Hunt say?

The Witness: He said yes, that we had had friendly relations so far as Craftmaster and the Furniture Workers Union had been concerned.

A. It was a general conversation following that where I was pointing out to him where we had jurisdiction in these types of plants all through the

(Testimony of John W. Truman.)

West Coast, that in none of them did I know of did the Teamsters have jurisdiction, and just generally pointing out to him that we were in a position to furnish him qualified men for the type of work that he needed. He said he appreciated that very much; however, he was bound by the master agreement with the Teamsters International.

Q. (By Mr. Boyd): Was any mention made by him of any other agreement with the Teamsters than the so-called national agreement?

A. Yes. He said that in their other plants covered by the Teamsters' agreements they had good working relations and he didn't want to jeopardize them by signing this plant to another organization, he felt that he would be subject to reprisals by Teamsters in other locations.

Q. Now, was there any more of your conversation with Mr. Sparrowk on that occasion that you now recall? A. No, sir. [96]

Q. Did that conversation result in any action which you then took?

A. No. I had a further meeting with him on February 3.

Q. All right, let's pass now to the meeting of February 3, which by reference to the calendar fell on Friday. A. Yes.

Q. And appears to have been Friday of the week following. What transpired on that date and where did you have the conversation?

A. I met Mr. Sparrowk in company of Carl

(Testimony of John W. Truman.)

Kissick, who is the business representative of Furnitures Local 3197.

Q. Was Kissick in your company in meeting Sparrowk? A. Yes, he went with me.

Q. He went with you? A. Yes.

Q. Very well.

A. We met in Mr. Sparrowk's office, sat and talked generally for a while, and got down to the meat of the thing where we again told him that we represented the people in that plant. At that time——

Trial Examiner: Excuse me a minute, if I may interrupt, but this has come up before. Whom do you refer to when you refer to "we represented the people in that plant"?

The Witness: I referred to the Brotherhood of Carpenters, the Washington-Oregon District Council of Furniture Workers, and [97] the Local 3197, who are affiliates of the Brotherhood of Carpenters.

Q. (By Mr. Boyd): By way of clarification of that, had there been a collective bargaining agreement with the Craftmaster organization in effect just prior to, up until, January 10?

A. Yes, sir, and in so far as I know it has never been terminated by the company.

Q. Who were the parties signatory to that in representing the mill employees in the plant?

A. The parties signatory, I believe, to my best knowledge, to be the Washington-Oregon District Council of Furniture Workers representing the employees and the local union and the Industrial

(Testimony of John W. Truman.)

Conference Board of Tacoma representing the manufacturers—— [98]

* * * * *

Q. (By Mr. Boyd): Mr. Truman, I hand you a document marked for identification General Counsel's Exhibit No. 6——

* * * * *

Q. (Continuing) ——and ask whether you can identify it.

A. Yes. This is a copy of the working agreement that was in effect with the Craftmaster Company and the local union District Council. [99]

Q. It was in effect in January of 1956?

A. Yes, sir. [100]

* * * * *

Q. Was there, to your knowledge, in January, prior to Englander taking over, an agreement between Craftmaster and the Upholsterers Union——

A. Yes, there was.

Q. (Continuing) ——which applied to the people employed in the craft of upholstering in the plant? [101] A. Yes, there was.

Q. Was there, so far as you then knew, any other agreement with any other labor organization applicable to any other employees of Craftmaster?

A. It was my understanding that the truck drivers were covered by agreement with the Teamsters Union. I don't know what local. [102]

* * * * *

Q. (By Mr. Boyd): Mr. Truman, did not your bargaining unit include the persons and only those

(Testimony of John W. Truman.)

persons who were employed in the classifications covered by the wage scales as they are contained in the last portion of the agreement called the wage agreement? A. That is right.

Q. In summary, does that include anyone in the classification of upholsterers?

A. Not in that plant.

Q. Not in that plant. Did it include anyone who was employed as truck drivers?

A. No, it did not.

Q. So did it apply to all other production and maintenance employees except truck drivers and those employed in the classifications of upholsterers? A. It did.

Q. Now, you were testifying about a further conversation you had with Mr. Sparrowk on February 3. Mr. Kissick was present? A. Yes.

Q. Will you proceed to relate fully that conversation?

A. I offered Mr. Sparrowk that we as furniture workers would withdraw our picket line providing he would rehire all [104] the former employees of the millroom that Craftmaster had on their payroll and who he told me he wanted back, and then we would ask him to sign a consent election and let the NLRB hold an election there to see who had the bargaining rights. He refused to do this on the basis that he was under an agreement with the Teamsters.

Q. Did he specify what agreement with the Teamsters he referred to?

(Testimony of John W. Truman.)

A. He only indicated to me, if I may use that word, that he—he indicated to me that he was referring to the master agreement.

Q. What terminology did he use? Let's put it that way. What terminology or phraseology did he use in characterizing this agreement with the Teamsters, to which he made reference?

A. He made reference to the Teamster agreement.

Q. Was that the extent of your conversation with Mr. Sparrowk on February 3?

A. I can check my notes here. We went further into the men who he was hiring at that time and pointed out to him that former employees of Craftmaster, men who he had alluded to in that same conversation, were capable of doing the work that these new men coming in off the street were doing at that time in the plant, that we felt that if he was sincere in wanting the former employees of Craftmaster back he would call those men back in to perform that work. * * * * * [105]

Q. All right, was there any further discussion with him on this date of February 3 on any other point?

A. On this date I am not too sure, but I am quite certain that during our conversation Mr. Sparrowk told us that he thought it could be worked out to a point where the Warehousemen's local would represent everybody but the millroom and that a working agreement could be reached where we would retain our jurisdiction in the mill-

(Testimony of John W. Truman.)

room. He said this was so and he would recommend to his superiors, because in other plants they had not come up against the question of the carpenters having representation in the plants.

Q. Do you recall any further point of discussion with him [106] on February 3, specifically?

A. Only he stated that in Los Angeles he had had very good working relations. He named our business agent in that area, Taylor, by name, and said that he had had very good working relations with Taylor, and the carpenters in general in that area. [107]

* * * * *

Q. (By Mr. Boyd): Did you hear from Mr. Sparrowk?

A. I called him Monday morning, reached him at the plant.

* * * * *

Q. That was your next contact with him, then, after February 3?

A. The morning of February 6.

* * * * *

Q. Was your conversation with him entirely by telephone that day? A. Yes.

Q. Will you relate to us, please, in full your telephone conversation with him?

A. He informed me that it caught him just as he was going uptown to have a meeting with Mr. Williams of the Warehousemen. He asked me if I had heard from Mr. Williams. I told him that I had, that Mr. Williams had asked me to meet him

(Testimony of John W. Truman.)

in his office at 3:30 that afternoon. I asked him if he knew [108] what the content of the meeting would be about, because I didn't want to be put in a cross fire between Williams and Sparrowk. He informed me he thought it better that I get all the information from Mr. Williams.

Q. Was that the extent of your conversation with him?

A. That was the extent of our conversation.

Q. This Mr. Williams of whom you speak is who?

A. Secretary-treasurer of Local 117, Warehousemen.

* * * * *

Q. Did you have a conversation with Mr. Williams that day other than the telephone call that you had had from him? A. Yes.

Q. First, with respect to the telephone call, when did you have it?

A. Mr. Williams called me about 11:45 Monday morning.

Q. And what was that call? What was his call?

A. Asking me to meet with him at 3:30 in his office.

Q. Did you meet with him at 3:30 in his office?

A. Yes, I did.

Q. Were you alone?

A. No. Carl Kissick was with me. [109]

Q. Was Mr. Williams alone when you met?

A. No, he wasn't.

Q. Do you recall who was with him?

(Testimony of John W. Truman.)

A. I am not sure if it was Mr. Walters or Mr. Bombadier. It was one or both.

Q. Now, will you relate, please, your conversation with Mr. Williams? [110]

* * * * *

A. Mr. Kissick and I met Mr. Williams in his office, and after a few pleasantries he told me that they had reached an agreement with the Upholsterers International whereby the Upholsterers in the Craftmaster plant would retain their membership in Local No. 5; however, they would pay dues and come under the health and welfare plan of the Teamsters, they also had to be members of the Teamsters. He said that he had just returned from Miami and the whole thing had been straightened out in so far as he was concerned. I informed him that the Upholsterers so far hadn't notified us of any agreement being reached, that until they did I thought we had very little territory to explore. He offered then to let the Local Union 3197, Furniture Workers, retain their jurisdiction in the millroom, providing he and I would first survey the plant, and he was allowed the pick of all jobs coming under his jurisdiction. I again informed him until such time as the Warehousemen and the Upholsterers had settled their differences I thought we had very little to talk about, and any time that I gave away our jurisdiction I would have to refer it to our International, and we left on that basis.

Q. You separated on that basis?

A. Yes, sir. [112] * * * * *

(Testimony of John W. Truman.)

Q. When thereafter was the first instance of your talking with anyone, either the company or the Teamsters Union?

A. That would be Monday morning, February 13.

Q. Now, where did this take place?

A. At the plant.

Q. What time did you arrive at the plant?

A. 7:10 Monday morning.

Q. Did you describe the circumstances as you found them there at that time and what transpired?

A. Yes. We were informed that the Teamsters Warehousemen Local had called the people and told them the plant was opening——

Mr. Bassett (interrupting): I move to strike that as hearsay.

Trial Examiner: I am going to strike it until it is brought out who informed him.

Q. (By Mr. Boyd): What had prompted you to be there at 7:10 in the morning? Let's get at it this way.

A. Both the preceding Friday and Saturday members of our local Union 3197 had called us both at the union office and at my home informing us that the Warehousemen had called them telling them that the plant was going to open on Monday morning. That would be Monday, February 13.

Q. All right, what did you do then on Monday, February 13?

A. We notified our people to all be there. [116]

Q. You did that in advance of February 13?

(Testimony of John W. Truman.)

A. Yes.

Q. All right, now, what happened on the morning of February 13?

A. On February 13 I arrived at the plant at 7:10, about 7:35 Mr. Williams with eight or nine other fellows showed up at the plant. We exchanged a few pleasantries and he informed me that the plant was going to open that morning if he had to wipe up Fourth Avenue with anybody that tried to stop him. I asked him if the sign over the door said Craftmaster or Boeing. That ended our conversation very abruptly.

Q. That ended the pleasantries?

A. Right.

Q. Now, proceed. What happened beyond that?

A. About 8 o'clock, with a large percentage of our people there——

Trial Examiner: I don't know whom you meant before by "our people" and I don't know now. Whom did you refer to when you said you notified all "our people"?

The Witness: Members of the Furniture Workers Local, 3197.

Trial Examiner: Had they been employed in a Craftmaster plant?

The Witness: They were all former employees of Craftmaster.

Q. (By Mr. Boyd): Incidentally, is that local made up from [117] other plants as well as the Craftmaster plant? A. Yes, it is.

Q. It is a mixed local? A. Yes.

(Testimony of John W. Truman.)

Q. But the people who were there that morning were what members of Local 3197?

A. Only the members of Craftmaster.

Trial Examiner: About how many were there?

The Witness: Approximately 28. [118]

* * * * *

Q. (By Mr. Boyd): Will you tell us what happened, then, after this exchange with Williams?

A. There were around 28 members of 3197, former employees of Craftmaster, a number of former employees of Local 5.

Q. Local 5 is the Upholsterers local?

A. Right.

Q. When you say former employees, you mean former members of Craftmaster who were members of local 5? A. Yes.

Q. Do you know who were there?

A. Yes.

Q. Do you know approximately how many of them were there?

A. I would say about the same amount as we had, 28 to 30, in that neighborhood.

Q. On that occasion was there any representative of Local 5 or the International Upholsterers Union present? [119] A. Yes.

Q. Do you remember who was present?

A. Royer.

Q. Royer was present? A. Yes.

Q. All right, now, let's proceed. What did you do that morning?

A. I waited until the doors were opened and people started going in and I went in with them; in

(Testimony of John W. Truman.)

fact, I led a bunch of people through the doors and up on the second floor. They all gathered on the shipping and receiving floor and were just milling about.

Q. Let me inquire, you said you led them through and into the plant. You led them through what? A. Seven or eight Teamsters.

Q. Where were they stationed?

A. In and about the door of the plant.

Q. Proceed. You led them up to the shipping floor, you say? A. Yes.

Q. Then what happened?

A. I was called into the office of Mr. Sparrowk. Mr. Williams was there, Mr. Hunt was there, and Mr. Williams started giving me a dressing down for leading a mob into his building.

Q. Mr. Williams did this?

A. Mr. Sparrowk did. I beg your pardon. I informed him that [120] most of those people were there because we had told them to be there, but primarily they had been called by the Warehousemen's local and told that the plant was to open, that I had told them that as long as the plant was going to be opened we wanted our people in there, too. Mr. Sparrowk informed me that up to that time he felt that he could work with me, that we would get along fine, but this was the last straw, I was no more welcome in his plant, that he was pretty hot under the collar about it, and there was the usual bickering back and forth that such an argument entails.

(Testimony of John W. Truman.)

Q. Were you alone there in representation of the Furniture Workers?

A. At that time or just prior to that Mr. Evans had come into the office also.

Q. I see. Was there anything further took place after Evans came in?

A. Yes. Mr. Evans asked Mr. Sparrowk or Mr. Hunt, or both, if Mr. Williams was their personnel agent. Mr. Hunt told him that inasmuch as they had the contract they had a perfect right to call the people in to work, referring to the Warehousemen's local. [121]

* * * * *

Q. He was specific in saying it was with, an agreement with, Local 117? I am asking you; I don't know.

A. I am trying to remember his exact words. He says, "These fellows have the agreement"—it was either Mr. Sparrowk or Mr. Hunt who made the statement, because at or about that time Mr. Sparrowk went out to address these people who were in the shipping or receiving room. [122]

* * * * *

Q. (By Mr. Boyd): Mr. Truman, you alluded to Mr. Sparrowk leaving the office to go and address some people. Did that occur while you were there? A. Yes.

Q. What did you do during his absence?

A. We stayed in the anteroom of his main office.

Q. And you stayed there with whom?

(Testimony of John W. Truman.)

A. Mr. Evans, myself, and—well, there was, I'd say, six or seven people in that area.

Q. Did you hear what Mr. Sparrowk said to the people whom he was addressing?

A. Only occasional words which didn't make too much sense to me.

Q. And these people whom he was addressing, do you know who they were?

A. Yes; they were the former employees of Craftmaster who were members of Local 5 and Local 3197. [123]

Q. The people who had come in with you that morning?

A. Right. I believe also others whom I had never seen in connection with the company before.

Q. Now, after addressing the group of former employees, what then took place?

A. We called a meeting.

Trial Examiner: Whom do you mean by "we"?

The Witness: The Furniture Workers Union.

Q. (By Mr. Boyd): You mean the local or this Washington-Oregon District Council? Which called the meeting?

A. The local union at the request of myself and the Washington-Oregon District Council called the meeting.

Q. Fine. For what date did you have the meeting, for what hour?

A. For that same morning at 10 o'clock.

Q. And where did you have the meeting?

A. At the Labor Temple here in Seattle.

(Testimony of John W. Truman.)

Q. To your knowledge, was there any other meeting called for at about that same time?

A. I believe the Upholsterers also met at that time. [124]

* * * * *

Q. (By Mr. Boyd): My question is, is it your best knowledge at this time that the members of your organization for the most part who went to work at the Englander company started on the 13th?

A. No, sir, I couldn't give a honest answer to that because at that time I was again assigned out of town.

Q. I see. But your meeting with them that you have referred to in your earlier testimony was on what date? A. February 13.

Q. It was on the 13th? A. Right.

Q. Was any instruction given to them at that time? A. Yes, there was.

Mr. Margolis: By whom?

Q. (By Mr. Boyd): And by whom?

A. By myself.

Q. What was the instruction?

A. My instructions were that the plant was opening, that we would withdraw the picket line, tell all our people to go down and apply for jobs. If in applying for jobs it meant that they had to sign an application with the Warehousemen's Local to go ahead and do it, that it was our feeling that to maintain the picket line, those that were not

(Testimony of John W. Truman.)

hired, would jeopardize their unemployment insurance so forth. [127]

Trial Examiner: Now, how many people, approximately, were at that meeting? By people I am referring to individuals you knew to be former employees of Craftmaster and who were members of the Local 3197, I believe it is.

The Witness: More than 25.

Trial Examiner: How many more?

The Witness: It would only be a guess on my part.

Trial Examiner: Would you say it was in excess of 30?

The Witness: I would say between 25 and 30.

* * * * *

Cross Examination

Q. (By Mr. Margolis): Mr. Truman, you had indicated in the early part of your testimony that the Furniture Workers Union, I believe it was Local 3197, had represented certain people in this plant since 1936, is that correct?

A. That is correct. [128]

Q. Now, by "this plant" you were referring to the Craftmaster operation, were you not?

A. Yes.

Q. Had you ever had any kind of a contract with The Englander Company, Inc., pertaining to this particular operation?

A. Not to my knowledge. [129]

* * * * *

Q. (By Mr. Margolis): Do you know for a fact whether Local 3197 had any members who

(Testimony of John W. Truman.)

were actually employees of Englander at that time, February 3?

A. No, sir, I don't. At that time, I believe, there were only five or six men in that plant, according to Mr. Sparrowk. [134]

* * * * *

Q. Now, Mr. Truman, there was reference made to a Warehousemen or Teamster agreement or agreements. Now, which was it, plural or singular, if you recall?

A. As I recall it was both.

* * * * * [136]

Q. But you would not dispute it if Mr. Englander would tell you there were several covering the several plants?

A. I would neither refute or admit it, sir, because I can't remember. [137]

* * * * *

Q. As far as you were concerned Local 3197 was not yet frozen out of this plant, was it, on February 3?

A. That is correct. We don't feel that way yet.

Q. All right, sir, that is fine, and I say more power to you. And you conducted your contacts with these various people with the view in mind of re-asserting the jurisdiction of 3197 over the Furniture Workers in this plant?

A. Of maintaining, not re-asserting. We didn't feel that we had lost it, didn't need re-asserting.

Q. In other words, you still take the position that there was no interruption in your right to bargain for the members of the Furniture Workers

(Testimony of John W. Truman.)

craft? A. Right.

Q. Despite the change in ownership and what else took place in the plant, is that correct?

A. We felt that despite the change of ownership we had the right to represent those people and to sit down and talk contract.

Q. All right, sir. As late as February 10, which was the Friday meeting prior to the people being called back to work, [138] there were conversations in which you were involved and in which the hope was expressed that the whole problem could be ironed out, isn't that a fact?

A. That is correct.

Q. And the whole problem certainly could not be worked out unless Local 3197 would have either retained or re-acquired its jurisdiction over these people as far as you were concerned?

A. That is correct.

Q. Now, this meeting that took place on the 13th of February—it is the morning that a number of people went back to work—I believe you said that Mr. Hunt was there, Mr. Williams was there, Mr. Sparrowk was there, and you were there, although not all necessarily at the same time, correct?

A. Yes, there was considerable moving in and out of Mr. Sparrowk's office.

Q. And you also said that some one, either Mr. Sparrowk or Mr. Hunt, had said that since there had been a Teamster's contract they could do the hiring, is that right?

(Testimony of John W. Truman.)

A. I think his exact words were "they have the contract, it is perfectly all right."

Q. Now, you are not sure, Mr. Truman, whether Mr. Sparrowk was in the office at the time that statement was made? Now, you had better search your mind because this may be important.

A. I didn't pay too particular attention to it because Mr. Hunt had been introduced to us as the new superintendent in [139] charge of the plant.

* * * * * [140]

Q. All right, now, you do not recall whether it was Mr. Sparrowk or Mr. Hunt who said it?

A. That is correct, I do not.

Q. You do not recall if it was Mr. Hunt, whether or not Mr. Sparrowk was even in the room? A. That is my testimony.

Q. Isn't it a fact that you do remember Mr. Sparrowk telling you that the Englander Company was doing the hiring in that plant and not Mr. Williams?

A. Oh, definitely. He was within about two inches of me. He was pretty hot and his face was pretty red, I won't forget that. [141]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Bassett): What was the purpose of the picketing, what did you hope to achieve?

* * * * *

The Witness: My purpose in condoning the picket line was to force the company to recognize the jurisdiction of the Furniture Workers. [147]

* * * * *

(Testimony of John W. Truman.)

Q. (Interrupting) I asked you whether or not you didn't so testify that you wanted him to employ members of your Union 3197.

A. That is true with reservation.

* * * * *

Q. (By Mr. Bassett): If there was any other purpose I will ask you to state what it was.

A. The purpose was to get the company to recognize the jurisdiction of the Furniture Workers Union and to enter negotiations.

Q. And whom did the Furniture Workers Union want to represent at that time? [148]

A. The former employees of that plant, naturally.

Q. Who were members of Local 3197, is that right?

A. And who Mr. Sparrowk indicated he wanted back.

* * * * *

Q. I understood you to say that this picketing was joined in by some other local?

A. It was a joint effort by Local 5 of the Upholsterers.

* * * * *

Q. Did I understand you to say, Mr. Truman, that on February 13 or February 14 you instructed the members of Local 3197 to report back and join the Teamsters Union? [149]

A. That in essence is what I said, yes.

Q. Before you gave those instructions did you tell Mr. Williams that you were going to instruct

(Testimony of John W. Truman.)

your members to join Warehousemen's Local 117?

A. No, sir.

Q. You hadn't told them that at any time?

A. No. We weren't on speaking terms about then.

Q. Well, I mean before then had you told them that you would do that? A. No, sir.

Q. I don't recall whether I asked you. Did I ask you when the picketing ended and when it ceased? A. Yes, you did.

Q. What date was that?

A. You specified that it was February 13th or 14th and I agreed with you.

Q. That is when you told the people to go back to work and join the Teamsters Union?

A. I would like to straighten that out, if I may.

Q. I am just trying to find out the date now on which the picketing ended. Was it the 13th, or 14th?

A. Either one of the two days either the 13th or 14th.

Trial Examiner: You tell me what you would like to straighten out, go ahead, sir.

The Witness: We told the members of the Furniture Local [150] 3197 to further maintain the picket line with the plant open would jeopardize their unemployment compensation, that if going to work at Englander entailed having to sign anything that the Teamsters put in front of them, to go ahead and sign it, that we were going to further process the case, we felt that we would be better

(Testimony of John W. Truman.)

off with our members inside the plant than out.

Trial Examiner: Did you instruct them to sign up with the Teamsters?

The Witness: We advised them. We advised them to do what was necessary in order to get back into that plant. [151]

* * * * *

Redirect Examination

Q. (By Mr. Boyd): When in relation to this meeting you had with your members was it that you withdrew your picket line? What is the sequence of that, withdrawing the picket line and the instruction to your members?

A. It was following the meeting with Mr. Sparrowk on February 13, and I am sure it was the following day, February 14, that we held this meeting in the Labor Temple. I checked my notes and I am sure of it.

Q. The meeting that you had that you testified to previously—— A. Yes.

Q. (Continuing) ——as being the meeting with your members which you testified to previously as being on the 13th was on the 14th? A. Yes.

Q. When in relation to the meeting on the 14th was it that your picket line was withdrawn, was it before or after that meeting?

A. I believe it was before the meeting and it was determined at the meeting.

Q. That is to say, when you say it was withdrawn before the meeting, were your pickets there on the 13th? [152] A. Yes.

(Testimony of John W. Truman.)

Q. Were they there on the morning of the 14th before the meeting?

A. I couldn't definitely answer that.

* * * * *

Q. (By Mr. Boyd): You said on the morning of the 13th, when you were being interrogated by Mr. Margolis, concerning your heated discussion with Mr. Sparrowk, with respect to your [153] leading a group of former Craftmaster employees into the plant, Mr. Margolis put the question to you, did not Mr. Sparrowk say to you that neither you or Mr. Williams was going to do the hiring for the plant. My question of you is did Mr. Sparrow in his statement to you allude to Mr. Williams?

A. No, sir, he did not.

Q. What did he say to you?

A. He said you know your organization are not hiring for this plant. [154]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Mladinov): I would like to pick up this mob point. It is a word that was bantered around.

I believe your testimony was there were about 28 people of Furniture Workers 3197 and about 28 or 30 people, I think you added, who were members of the Upholsterers Local Union 5, whom you led through this line of seven or eight Teamsters fronting the Englander plant on the morning of February 13, 1956. Is that a fairly accurate statement? A. I am sure the number——

(Testimony of John W. Truman.)

Q. (Interrupting) Is my summary of it an accurate statement of your testimony?

A. Yes, it is.

Q. Were these people orderly?

A. Yes, they were.

Q. Was there any undue noise or pushing?

A. None that I saw.

Q. They filed in through the front doors?

A. Yes.

Q. Did they proceed right on upstairs?

A. To the best of my knowledge they did.

Q. Were you with them all the time until you went into the company's office at which the later conversation took place? [155]

A. I was in, near or around them.

Q. Did you notice anything at any time which was disorderly which threatened the company's property or which threatened the comfort or safety of anybody in the plant? A. No, sir. [156]

* * * * *

Trial Examiner: Now, will you tell me what the Washington-Oregon District Council of Furniture Workers, A.F.L.-C.I.O., [159] is?

The Witness: Yes. It is a group of five local unions banded together under what we term a district council, who negotiate on an industry-wide basis over Oregon and Washington labor contracts.

Trial Examiner: Now, specifically referring to 3197, do you know what the relationship is between that organization and the Carpenters, the International Union?

(Testimony of John W. Truman.)

The Witness: Yes, they are an affiliate union of the Brotherhood of Carpenters.

Trial Examiner: Do you know who chartered the organization?

The Witness: Yes.

Trial Examiner: Who chartered them?

The Witness: The Carpenters.

Trial Examiner: What is the relationship between the Council and the Carpenters?

The Witness: It is a district council under the Carpenters.

Trial Examiner: You have been testifying about a mill room. Are you familiar with the inside of the plant?

The Witness: Yes, sir.

Trial Examiner: Specifically as of the time when or immediately preceding the time when the predecessor of Englander at the plant discontinued operations, what kind of employees worked in the mill room? [160]

The Witness: I don't understand.

Trial Examiner: Were they Upholsterers or Furniture Workers or what?

The Witness: The mill room was manned by members of the Furniture Workers Union.

Trial Examiner: What went on in the millroom?

The Witness: The cutting of stock, that is, lumber, doweling, fitting and so forth, making chairs, davno chairs, davno springs, box spring beds, all woodworking in connection with the manufacturing of that type of furniture.

* * * * *

(Testimony of John W. Truman.)

Redirect Examination

Q. (By Mr. Boyd): What were the other classifications of workers whom you were representing in dealing with Craftmaster apart from those who worked in the millroom because it is a latent issue here?

A. The shipping and receiving floor, the boiler-room and carloaders and unloaders, lumber handlers.

Q. When you talked with Mr. Sparrowk on January 26, the first occasion of discussing with him your interest in that problem, I understood your testimony was that Sparrowk made some statement that if the Furniture Workers represented the people who worked in the millroom that he would agree to recognize you, is that correct? [161]

A. He said that he would recommend to his superiors that we be recognized.

Q. He would make that recommendation?

A. Right. [162]

* * * * *

WILLIAM F. EVANS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): What is your employment and where is your office?

A. I am the executive secretary of the Washington-Oregon District Council of Furniture Work-

(Testimony of William F. Evans.)

ers, A.F.L.-C.I.O. My office is at 1322 South Fosssett Avenue, Tacoma, Washington.

Q. How long have you held that office, how long have you held the office of executive secretary?

A. Two years and ten months.

Q. I first hand you a document marked for identification General Counsel's Exhibit No. 6 and ask you whether you can identify that and, if so, what you identify it as being.

A. This is the 1955-'57 working conditions agreement between the Furniture Manufacturers of Washington and Oregon whose names appear on the back page and the Washington-Oregon District Council of Furniture Workers and its affiliated unions. [164]

Q. Is that a true copy of the original document?

A. I note it is not a signed copy but I will swear to its being a true copy inasmuch as it was typed, mimeographed and put together in my office.

Q. Under your direction?

A. Under my direction.

Q. The original of it did you sign?

A. The original is signed by myself and the business representatives of the affiliated unions and the representatives of the Industrial Conference Board, Mr. Muckey and Mr. McCulloch.

* * * * *

Q. (By Mr. Boyd): When, Mr. Evans, was the

(Testimony of William F. Evans.)

first occasion you had to talk with any representative of The Englander Company? [165]

A. Well, the first meeting that I had with any representative of The Englander Company as regards this particular controversy was on February 13.

Q. February 13? A. That is right.

Q. Prior to that time had you had any correspondence with the company? A. Yes.

Q. When did you first have correspondence with the company?

A. Could I deviate a little from my answer here as to when I was notified and how I sent my correspondence or would you want a direct answer on the matter?

Q. Let's see what you have in mind. I don't know what you have in mind.

A. Well, I first heard that Craftmaster Company were planning on selling the plant to The Englander Company on January 9, '56, late in the afternoon. On January 10, which I believe was a Tuesday—my daily report record indicates that it was a Tuesday—I went to Portland to confer with an attorney which we maintain in Portland as to the importance of our successor and assignee clause. [166]

* * * * *

Q. What did you do after you had this discussion?

A. On January 11 I wrote a letter to The Englander Company at 6425 San Leandro Avenue,

(Testimony of William F. Evans.)

Oakland, California. I also sent copies to the Craftmaster address in Seattle, directed to The Englander Company, and I sent a copy of the same communication to the Northwest Terminal Sales Building, Portland, Oregon. [168]

* * * * *

Q. (By Mr. Boyd): Is this document which for identification is marked General Counsel's Exhibit No. 7 a true copy of the letter to which you have testified? A. Yes.

Q. Was that letter sent by regular or registered mail? A. Registered mail, return receipt.

* * * * *

Trial Examiner: It will be received. [169]

* * * * *

Q. (By Mr. Boyd): What, if any, response did you get to this letter?

A. It was never answered.

Q. Did you get any response by any means other than correspondence? A. None.

Q. What did you do when you failed to get a response to this letter?

A. I waited until I thought a reasonable amount of time had elapsed for them to at least receive the communication in Seattle and then I came to Seattle and conferred with the local business representative, Mr. Kissick.

Q. That is Carl Kissick?

A. Carl Kissick. That was January 12, in the afternoon.

(Testimony of William F. Evans.)

Q. And as a result of that conference what did you do, if anything?

Mr. Bassett: Pardon me. Has that exhibit been identified?

Trial Examiner: General Counsel's 7.

Mr. Bassett: Thank you.

Q. (By Mr. Boyd): As a result of the conference what did you do, if anything?

A. Well, we established a picket line on the 13th.

Q. On Friday, the 13th of January—

A. Friday, January 13.

Q. (Continuing) —at the time when you established the picket [170] line, were the premises of the plant being picketed? A. Yes.

Q. And by what organization and for what period of time, if you know?

A. Local 5, Upholsterers.

* * * * *

Q. (By Mr. Boyd): After you established your picket line, what then transpired insofar as your dealings with The Englander Company or any of its representatives?

A. Possibly I should clarify my position in this matter. As a District Council, secretary, if I may do that—

Q. My question of you was what did you do.

A. Well, that is what I am leading up to.

Trial Examiner: Well, do you have to in order to tell us what you did?

The Witness: Yes, really, I think—I only work in a coordinating capacity and therefore I turned

(Testimony of William F. Evans.)

the picketing over to 3197, and I contacted the International Brotherhood of Carpenters and asked that Mr. Truman be assigned to the case.

Q. (By Mr. Boyd): And then he was assigned?

A. Then he was subsequently assigned.

Q. Did you personally have any contact with the company prior to his assignment? A. No.

Q. After he was assigned when did you have your first contact with the company?

A. The morning of February 13.

Q. That has reference to this date to which Mr. Truman testified? A. Right.

Q. Will you state your recollection in detail of what transpired on that date?

A. Well, I was a few minutes late getting there, and when I arrived at the plant, which I think was around 10 minutes after 8, the only people in front of the building were supposedly Teamsters. I only knew one of them so I could only say in my own way that one of them was a Teamster representative. I went up into the office on the upper floor—I don't know which floor you identify this as, but I believe it is the second floor.

Q. Is it the floor on which the main office is?

A. That's right.

Q. All right, let's call it that.

A. Mr. Kissick, Mr. Truman, were standing outside at the desk there, and there were several people, I believe, who were making applications for employment. I knew none, Mr. Truman [172] was then called into Mr. Sparrowk's office, which

(Testimony of William F. Evans.)

was around the corner to the right. I was not called in. I don't believe that anybody knew who I was up to that point. I heard some loud talking in there and I went in on my own volition, and Mr. Sparrowk was talking to Mr. Truman and was quite upset over Mr. Truman taking some of the employees into the factory. And the part of the conversation which I heard was that he was telling Mr. Truman that he nor his organization were going to do their hiring.

Trial Examiner: That Mr. Truman and his organization wouldn't do the company's hiring?

The Witness: That is right.

Trial Examiner: All right.

A. At this time I recall very distinctly that I had been in Seattle on Friday, the 10th, at which time the Teamsters organization was calling members of Local 3197, telling them to come up to the Teamsters Hall——

Mr. Bassett: Just a minute. I object to that as hearsay.

The Witness: It is not hearsay.

Trial Examiner: Excuse me, this may be a fact, although we may call it hearsay we will find out in a moment.

You had better lay a foundation for this, if you are moving to strike what he said about the Teamsters calling the people I am going to grant the motion. You can go into it, if you want to, Mr. Boyd. [173]

Mr. Boyd: Let me find out specifically.

(Testimony of William F. Evans.)

Q. (By Mr. Boyd): Mr. Evans, from what source did you get this information that you are about to testify to?

A. Well, I have some notes which I was keeping during the day and I have one in particular which I made on that day and which I was in one of the offices of the National Labor Relations Board, and one of the members of Local 3197 had called the Furniture Workers' office about this matter of the Teamsters calling them to go to work, and they referred the call up here because they knew I was here, and I took this call——

Q. (Interrupting) Who was calling?

A. Jeanette Testerman.

Q. And Jeanette Testerman, what relation did she have to your Local 3197?

A. She was a member and a former employee of Craftmaster.

Q. So this information that you got you got from this employee, this former employee?

A. Right.

Trial Examiner: The information he got, by the way, has been stricken.

Mr. Boyd: I understand that. You asked me to lay a foundation and I am trying to do that, to show if it is basically hearsay.

Q. (By Mr. Boyd): But based upon such information you got prior to the 13th, what did you do on the 13th? Let's get back [174] to the 13th now.

(Testimony of William F. Evans.)

A. You are referring to our presence in Mr. Sparrowk's office?

Q. That is right.

A. I explained then to Mr. Sparrowk and Mr. Hunt, who were present, and Mr. Williams was sitting in the room also, but I was talking to Mr. Hunt and Mr. Sparrowk, and told them that there was a misunderstanding because, if anybody was responsible for the members of Local Union 3197 being down there to go to work that morning, it was the Teamsters, and specifically Mr. Williams and others of his staff whom I don't know.

Q. What, if anything, did you say to Mr. Sparrowk or Mr. Hunt that Mr. Williams had been doing? Let's get at it that way if it came in that way.

A. I said apparently Mr. Williams is acting as your personnel manager.

Q. Did you explain to them why that was apparent? Did you specify why that was apparent?

A. Well, I said it was apparent because he had been calling our members February 10 and Saturday, February 11, telling them to come up to the Teamsters Hall, clear through the Teamsters Hall, sign whatever papers was necessary, and they would be able to go to work on Monday, February 13. That is the information. [175]

* * * * *

Q. What more was then said?

A. I believe at that time, although I am not absolutely positive, but I believe at that time that

(Testimony of William F. Evans.)

Mr. Sparrowk left the room to talk to the employees who were assembled out in the factory. I believe that is true. I won't say it for sure.

Mr. Margolis: Mr. Examiner, may I ask a question on voir dire preparatory to a motion?

Trial Examiner: All right, sure.

Q. (By Mr. Margolis): Was Mr. Sparrowk in the room when you made that statement about Mr. Williams being the personnel manager?

A. I am sure he was.

Q. And did he then respond to your comments?

A. The only person I can recall who answered me was Mr. Hunt.

Q. Was Mr. Sparrowk out of the room at that time? A. I am not positive.

Trial Examiner: Excuse me a minute. I think that this is——

Mr. Margolis: I move to strike.

Trial Examiner: Do you want to strike?

Mr. Margolis: I move to strike, and on the ground that it is a voluntary statement which is hearsay and there was not any opportunity for refutation so therefore we are not saddled with [176] his gratuitous comment.

Trial Examiner: Excuse me a minute.

Mr. Boyd: I want to be heard on that.

Trial Examiner: You don't have to be. I will deny the motion.

* * * * *

Q. (By Mr. Boyd): After this remark was made what occurred?

(Testimony of William F. Evans.)

A. Mr. Hunt said Mr. Williams had the right to call these people inasmuch as the Teamsters held an agreement with The Englander Company. [177]

* * * * *

Q. Were you present during any discussions on that day or prior to that time with Mr. Williams or any other person connected with Local Union 117?

A. Yes. One day I accompanied Mr. Al Gord of the Upholsterers, Mr. Ralph Royer, Mr. Carl Kissick—

Q. Royer is with whom?

A. He is with the Upholsterers.

Q. And Carl Kissick is with whom?

A. Local Union 3197; Mr. John Truman of the Brotherhood of Carpenters, I accompanied them to Mr. Williams' office.

* * * * *

Q. Is this the same meeting with Mr. Williams to which Mr. [178] Truman testified as having occurred on February 6? A. No.

Q. Oh, well, then, you fix the date of this meeting that you are referring to.

A. No, I don't seem to have indicated here what day this was.

Q. All right, you fixed the place as being in Mr. Williams' office. Will you recount, please, what transpired there? Who was with Mr. Williams, if you recall?

A. In the beginning I believe we just talked to

(Testimony of William F. Evans.)

Mr. Williams alone. He later went into a larger meeting room and called in Mr. Sweeney.

* * * * *

Mr. Boyd: Will you stipulate, Mr. Bassett, that John [179] Sweeney is the secretary-treasurer of the Western Conference?

Mr. Bassett: Yes, I will do that.

Mr. Boyd: All right.

* * * * *

Q. (By Mr. Boyd): What happened in Williams' office before you went and got Sweeney, what was your discussion?

A. Mr. Boyd, I was not leading in the discussion, I was merely [180] in there as a spectator inasmuch as this meeting that day was primarily a discussion between Al Gord and Mr. Williams over the efforts of the International to come together on this so-called mutual assistance pact which the two Internationals have. So I was merely there as a spectator, I said nothing.

* * * * *

Q. (By Mr. Boyd): All right. After Sweeney came in do you remember what transpired?

A. Well, yes, I do but I still say it was not my conversation and I don't remember what took place there.

Q. In other words, what you are saying is there was a discussion concerning some proposed agreement between the International Union of the Upholsterers and the Teamsters? A. Right.

* * * * * [181]

(Testimony of William F. Evans.)

Q. (By Mr. Boyd): Mr. Evans, as a result of that which resulted on the morning of February 13, at the plant, what, if any, action was taken by Local 3197?

A. We decided to call our pickets off.

Q. When was that decision made?

A. Right around noon on the 13th.

Q. And when were the pickets taken off?

A. I think they were taken off at noon.

Q. What further action, if any, was taken by Local 3197?

A. We called all the members into a special meeting on [182] February 14 at 10 a.m. at the Labor Temple. We didn't insist that those who were already employed at Craftmaster put in an appearance.

Q. At this meeting what action was taken?

A. Well, as I recall, we explained to these people who were present, these members who were present, rather, that the plant was apparently opened and the Upholsterer's members were going back to work, that some of our members had gone back to work, and that the Teamsters had brought in some people who were hired, therefore we thought it was advisable for them to seek employment with the company, and we advised all of them to contact the company and ask for their jobs back.

Q. Now, this was around 10 o'clock on the morning of February 14? A. Right.

Q. Did you give them any further instruction

(Testimony of William F. Evans.)

with respect to what they should do at the company's office or any place else? * * * * *

Trial Examiner: * * * * * Tell us what you told the people, if anything, in addition to applying for their jobs. [183]

A. We told them if it was necessary to clear through the Teamsters Union, Local 117, to do so, under protest.

Q. (By Mr. Boyd): Is that the extent of the instruction that you gave them?

A. That is the extent of our instruction.

Q. One thing more, Mr. Evans. Can you state from your own knowledge approximately how many of the members of 3197 were being employed by Craftmaster up to this time when Craftmaster made the deal with The Englander Company?

A. Thirty-five.

Q. And were those 35 being employed fairly regularly right before that time, or do you know?

A. Yes, I have accurate records of it. [184]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Margolis): Mr. Evans, what was the purpose of sending this letter of yours dated January 11, which has been marked and received as Exhibit 7?

A. I think the letter is self-explanatory, isn't it?

Trial Examiner: Excuse me, Mr. Evans, counsel is asking you a question, without objection or some other observation it is your duty to answer it, if you can.

(Testimony of William F. Evans.)

A. To acquaint them with the fact that we had a labor agreement with the Craftmaster Company which contained a successor and assignee clause, and along with that, I believe in the communication, we asked for a meeting with them to discuss our position.

Q. (By Mr. Margolis): The letter was sent in good faith so that you could sit down and discuss the situation with them? A. Right.

* * * * *

Q. You are sure that letter was mailed on the 11th of October, or, correction, the 11th of January? [187] A. I am sure it was.

Q. And you never got any response to that letter, is that correct? A. No response.

Q. All right, when did pickets for Local 3197 first appear at the plant in question?

A. January 13.

* * * * *

Q. Now, your recollection of this conversation on February [188] 13 at the plant is quite clear, is it, Mr. Evans? A. Yes, it is.

Q. You had some notes, I believe, of the various steps that had taken place during these discussions? Did you, sir?

A. Well, on certain phases of it, yes.

Q. Certain things that were important. You kept sort of a running diary?

A. I kept a report of who I met.

Q. And generally what was discussed?

A. Not in all cases, no.

(Testimony of William F. Evans.)

Q. Could I see that daily report, please?

A. Well, it is rather a personal deal but it indicates the days on which I was at Craftmaster, starting with January 10.

Q. Yes, could I see it, please? A. Yes.

* * * * * [189]

Q. (By Mr. Margolis): This paper you handed me is for February, 1956, actually it is an expense record, isn't it, Mr. Evans? A. Yes.

Q. And it shows on February 13, Seattle and return, Englander in the morning and 3197 in the afternoon of February 13. You have other papers here that have some notations pertaining to the February 13 meeting, have you not?

A. No, I don't believe I have other than I grouped the trips that I made so I didn't have to go through this (indicating), off of this (indicating).

Q. Now, actually there is a sheet here that has an entry of February 13, it says went into Sparrowk's office——

A. (Interrupting) John, I, and Williams. [191]

Q. "John, I, and Williams"? A. Yes.

Q. Do you have any records here that indicate anything as to what Mr. Hunt had said in the plant that date? A. No.

Q. So there is nothing available here that would refresh your memory as to the conversation there?

A. No.

Q. Whom did you look to when you entered the plant as being the representative for Englander for

(Testimony of William F. Evans.)

the purpose of negotiating this matter, Mr. Evans?

A. Well, at that particular time Mr. Truman was in the case and I merely went into Mr. Truman.

Q. But in regard to the company's representative, who was that?

A. That would be Mr. Sparrowk.

Q. Mr. Sparrowk? A. Yes, surely.

Q. Did you know what authority, if any, Mr. Hunt had with reference to matters pertaining to labor negotiations on behalf of The Englander Company? A. Not at that time, no.

Mr. Margolis: Mr. Examiner, at this juncture I move to strike as hearsay and not binding on the respondent employer the alleged statement of Mr. Hunt's that it would be O.K. for [192] Mr. Williams to hire as the Teamsters had an agreement, on the ground that there is no authority shown for his making such a statement, if he did make it.

Trial Examiner: Well, does this witness have to show the authority?

Mr. Margolis: I submit that it is hearsay otherwise.

Trial Examiner: I am satisfied that there is a prima facie foundation in the record apart from this witness' testimony requiring me to deny the motion.

Mr. Margolis: Exception. [193]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Bassett): Did you tell the Local

(Testimony of William F. Evans.)

that you had written a letter on January 11 and that you hadn't received any answer from it?

A. I am sure I did, yes.

Q. When did you tell them that?

A. I don't recall exactly.

Q. But you must have told them before the 11th? A. Surely I must have. [194]

Q. And how long did that picketing continue?

* * * * *

A. The picketing continued until February 13.

Q. (By Mr. Bassett): Who was being picketed commencing January 11, Craftmaster or Englander, or do you know? A. I don't know really.

Q. You don't know, you just picketed the building?

A. Picketed the building, that is right.

* * * * *

Q. What was the purpose of your picketing, what were you trying to do or accomplish by it?

A. Well, I don't know how to identify it. The signs, as you know, said "Unfair", whether it was an organizational picket [195] line or what it was I don't know.

Q. Were you trying to secure employment for those people who were out of work? Was that the purpose?

A. At that point I don't know.

Q. You don't know what the purpose of it was?

A. No.

Q. And when did that picketing terminate?

A. February 13. [196]

* * * * *

(Testimony of William F. Evans.)

Redirect Examination * * * * *

Q. (By Mr. Boyd): What dates do your return receipts show the receipt of the letter of January 11 by the different addressees?

A. Received on January 13. [199]

* * * * *

RALPH ROYER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): Mr. Royer, what was your employment in January of 1956?

A. I worked as an upholsterer for Craftmaster.

Q. How long did you work for Craftmaster?

A. Since August 26 I hired in. I worked from August 28, 1946, to January 10, 1956.

Q. Did you have any connection with any labor organization?

A. I was the business agent for Upholsterers 5 Local Union. [203]

Q. How long had you served in that capacity?

A. Since June 9, 1954.

Q. Mr. Royer, during the first ten days of January, 1956, approximately how many people were employed in the upholstery department by Craftmaster, if you know?

A. My local at Craftmaster had 71 people according to our health and welfare form that the

(Testimony of Ralph Royer.)

company sends in, that covers the sewers, the mattress room and the upholsterers.

Trial Examiner: Those are members of your union?

The Witness: Yes.

Trial Examiner: Do you know how many of the people who were employed in the upholstery department—whether or not they were members of your organization?

The Witness: They were all members of our organization.

Q. (By Mr. Boyd): Were they all being employed during that ten-day period?

A. That is right.

Q. When did your employment there terminate?

A. Twenty minutes after 4, January 10.

Q. And by what notification?

A. The foreman, Bill Moore, came out and gave us our check and termination slips. [204]

* * * * *

Q. (By Mr. Boyd): What did you do on that morning of the 11th of January after you had some telephone calls?

A. I went down to the Labor Temple and sat and waited for the members to come and after listening to them I called Philadelphia, our International, to Sam Hoffman, a quarter after 10 that morning and talked to him, and then at 12 o'clock I put another call to him, me and Mr. Al Gord, and we were instructed or I was instructed, rather, to put the pickets out there, and so I put them out, oh,

(Testimony of Ralph Royer.)

about 12:30 or quarter to 1 by the time they got down to the plant.

Q. That is on Wednesday, the 11th of January?

A. Correct.

* * * * *

Q. When did you next return to the plant?

A. On a Monday — I was down there directing the pickets for awhile up until we got what we call a picket captain. But the first time I went in the plant after that was on Monday, the [207] 16th, a bunch of us went in there.

Q. Very well, what time was it you went in on Monday, the 16th?

A. Oh, somewhere around 8 o'clock. It was opening-up time. We heard rumors that they were going to hire a bunch of people so we all went in to apply for that job.

Q. Who was in the plant when you went in?

Mr. Bassett: What was the date?

Trial Examiner: January 16.

A. Who was in there to talk to us you mean?

Q. (By Mr. Boyd): Yes.

A. As I recall, the old force was all there, because I had talked to Bill Moore, and I had spoke to Ed Hunt there, and — Mr. Sparrowk come out and give us a talking to out on the floor. [208]

* * * * *

Q. (By Mr. Boyd): You say that he made that clear. What was the question that was raised, that was addressed to him by one of those persons attending that session?

(Testimony of Ralph Royer.)

A. As I recall it, somebody raised a question on the floor there about whether they had to join the Teamsters Union or not.

Q. Do you recall whether Mr. Sparrowk made a response to that question?

A. No, I don't recall right off.

Q. Had you personally talked with Mr. Sparrowk before the time when Mr. Sparrowk talked to this group that you were one of on the morning of January 16?

A. The first time I talked to Mr. Sparrowk was, Mr. Evans, Johnny Truman, Carl Kissick, and myself was, in his office there, and if I am not mistaken I seen Brother Williams in there that morning, and we went into Sparrowk's office for a few minutes and talked to him and got nowhere and then we went out. [211]

Q. What is the morning that you refer to now, what is the date?

A. The exact date I don't know, all I know is that it was a Monday because that is one of the days we had the group there. We had them on three different Mondays. We heard that they were going to hire a crew and on Monday they showed up.

Q. Will you relate to us that which developed in the conversation among you on this date that you now have in your mind?

A. The only thing I can recall is that Mr. Truman and Mr. Sparrowk didn't seem to get along, a couple words said, and Mr. Sparrowk let him know

(Testimony of Ralph Royer.)

that he didn't invite us down there and we just plainly got nowhere and that was about it. Brother Williams came in and sat down, and my Local, my International, has a pact with the Teamsters, and, of course, I was thinking that it would be settled by the International headquarters, Philadelphia, Florida, or somewhere.

Trial Examiner: Was all this spoken about at this meeting?

The Witness: No, sir.

Trial Examiner: Let's forget about the pact. Tell us the conversation and what happened.

The Witness: The only thing I remember, Mr. Sparrowk told Johnny Truman that he didn't invite us down there.

Q. (By Mr. Boyd): Are you able to fix this date in relation to when the plant operations resumed?

A. We went down on a Monday—you mean when Englander started [212] to work, is that it?

Q. Yes, that is right.

A. We went down on a Monday with the whole crew down there to go to work. They didn't hire anybody so I held a special meeting called at the Labor Temple at 10 o'clock that morning, and I invited Mr. Williams to attend the meeting along with—of course Al Gord was working with me from Local 6 Upholsterers, but Mr. Williams came in there and Bombadier and another guy that was with them.

Trial Examiner: Did you want to leave Mr. Sparrowk's office?

(Testimony of Ralph Royer.)

Mr. Boyd: He is identifying the date of his meeting in Mr. Sparrowk's office and he is doing it by reference to another meeting.

Trial Examiner: I would assume that unless shown to the contrary that this was on February 13.

Mr. Boyd: I think it is.

Trial Examiner: You have already had two witnesses testify to that and here is a third witness that testifies, although in abbreviated form, that feelings were not so good. We know this is February 13. Maybe they will come along with another version but Mr. Sparrowk has testified to that.

Mr. Boyd: That is right. I do desire this witness to proceed with his own union meeting on the morning of February 13. [213]

Trial Examiner: All right, go ahead.

A. I told the members that I had received a wire from the International saying that we were to work or that the former Craftmaster employees was to work under the Teamsters' jurisdiction but to remain members of Local 5, still to stay in our Local 5 books, but they were to work under the Teamsters' jurisdiction.

Mr. Margolis: Mr. Examiner, I move to strike as being hearsay. It certainly can't have any probative value in this case.

* * * * *

Q. (By Mr. Boyd): Did you say that Mr. Williams was present? A. That is right.

Q. Mr. Williams of the Teamsters Union was present during this meeting?

(Testimony of Ralph Royer.)

A. He was present. We had him there to talk to our members.

Mr. Bassett: I withdraw my objection on the ground of hearsay.

Mr. Margolis: As I understand it, Mr. Examiner, the [214] witness is relating the contents of a wire that he had received from his union, and that is hearsay on any grounds.

Trial Examiner: All right. I am going to strike what this witness testified to about the contents of any wire. I suggest that you go ahead and you reframe your question as to what happened at this meeting. Now, it may be that something was done about the wire, I don't know.

* * * * *

Trial Examiner: Before you exclude Mr. Williams from that meeting and sent him on his way, tell us what, if anything, happened up until the time he left, at the meeting.

The Witness: Well, he just more or less explained the Teamsters' deal in there and the exact words of what Mr. Williams said in there, as I said, I had no record with me on it.

Trial Examiner: You seem to be the only one who is concerned with exact words and complete identification of detail, and I will tell you frankly that of the witnesses we have had thus far you are giving us less than anybody else of detail. [215] Instead of telling us that you cannot remember the exact words of anything give us your best recollection, if you have one.

(Testimony of Ralph Royer.)

The Witness: The best recollection I have there is that they talked on their pension plan that they had.

Trial Examiner: Who talked?

The Witness: Mr. Williams, and their insurance, he told them that they had an insurance plan and pension plan and also that they had contracts with The Englander Company down in California.

Q. (By Mr. Boyd): That was the extent of Mr. Williams' remarks? A. Yes.

Q. Even though you repeat what you have said previously, what was your remarks to your membership while Mr. Williams was there?

A. I made no remarks to our members when Mr. Williams was there. I just had Mr. Williams talk and Mr. Gord and I conducted the meeting, until after the Teamsters left.

Q. All right, what did Mr. Gord say, then, to the members while Mr. Williams was still there?

A. Well, Mr. Gord talked on the telegram that was sent to us about working.

Q. All right, what did Mr. Gord tell the members in Mr. Williams' presence that was in the telegram, what did he say that was in the telegram?

A. He told him that we were to instruct our members to go to [216] work under the Teamsters' agreement, under the Teamsters' agreement but still remain members of Local 5.

Q. In Mr. Gord stating this to the members did he say by whose authority that instruction was being given?

(Testimony of Ralph Royer.)

A. It was signed by Sam B. Hoffman, International President.

Q. Do I understand correctly that Mr. Gord read this telegram to the employees or did he merely explain its contents to the employees?

A. I don't know if he read it now or not, I couldn't recall for sure.

Q. Incidentally, where is Mr. Gord today?

A. Philadelphia.

Q. Was there more, was there anything more, that was explained to your members as to what they should do or what was to transpire thereafter?

A. Not until after the Teamsters left and then I took a vote on it with our membership.

Q. And you voted on what issue?

A. We voted to send the members back or send the members to work under the Teamsters' agreement, and then that afternoon, why, we had another meeting in the Teamsters hall with our members.

Q. I didn't hear the end of your answer, I am sorry.

A. In the afternoon we had a meeting in the Teamsters hall with our members, Mr. Williams conducting the meeting there. [217]

Q. And what transpired at that meeting?

A. Well, he read over—I don't know how to put it. Not a signed contract, just a contract that they have up and down the Coast and to other plants, he read that to the members.

Q. You say it was not a signed contract, is that right?

A. No, I don't think it was.

(Testimony of Ralph Royer.)

Q. It was the form of a contract, is that it?

A. Yes.

Q. After having read this what did he do or say?

A. He answered questions for the members.

* * * * *

Trial Examiner: Now, excuse me a minute.

About how many of your members who had worked for Craftmaster were present at the first meeting you described which was attended by Mr. Williams, your meeting?

Trial Examiner: I had them all present there but six, and we had seventy-one in the Craftmaster plants, so that would leave sixty-five.

Trial Examiner: I am not too clear of the result of the resolution that was put, what was it? [218]

* * * * *

The Witness: The vote was 100 per cent to go to work under the Teamsters' agreement.

* * * * *

Trial Examiner: All right, the Teamsters' agreement with whom?

The Witness: Warehousemen's Local 117.

Trial Examiner: All right. Now, at this subsequent meeting at which questions were asked and answered by Mr. Williams about how many of your members were there?

The Witness: Well, it was still the same bunch that we had in the morning. They were all there, all but six of them.

* * * * *

(Testimony of Ralph Royer.)

Q. (By Mr. Boyd): Do you recall the questions that were put to Mr. Williams and the answers which he made to those questions?

A. I would say the majority of the questions were on the pension plan. [219]

Q. As a result of the meeting that was held at the Teamsters hall that afternoon, what then developed, what then took place?

A. Right off I will have to think a little bit.

Mr. Bassett: If it will help by leading him, go ahead and lead him. I don't know what you have in mind when you say result.

A. I think I can answer it. They have filled out some sort of a form. I never saw the form, I don't know what it is.

Trial Examiner: Who filled it out?

The Witness: The members did of Local 5.

Q. (By Mr. Boyd): You say you did not see this form? A. No, I didn't.

Q. All right, up to this time had the Upholsterers Union continued in their picketing activities?

A. Friday night—let's see, the 13th was on a Monday—do you have a calendar there?

Q. Do you have reference to the Friday preceding the 13th? A. Yes, that is right.

Q. I show you a calendar of February '56.

A. The 10th would be our last picketing day.

Q. Picketing ceased on the 10th?

A. That is right.

Q. Under what circumstances was it the picketing ceased at the plant?

(Testimony of Ralph Royer.)

A. We never picketed the plant on Saturday. And on Monday [220] we went in to apply for a job and then I called a meeting at 10 o'clock. I didn't have no pickets out there because I wanted even the pickets to attend the meeting.

Q. When after your meetings on Monday, the 13th, was it that your people were assigned to work?

A. I think it was the following day.

Q. The 14th? A. The 14th.

Trial Examiner: Had any of them worked in the plant for The Englander Company before this?

The Witness: No.

Q. (By Mr. Boyd): Were these people who were assigned to work on the 14th people who had been in the employ of Craftmaster until the time when Craftmaster ceased its operations?

* * * * *

Trial Examiner: No, do you understand the question?

The Witness: I doubt that I do yet.

Trial Examiner: There is no sense thinking about a question that you don't understand.

The question is this, those people who went to work after the meeting with Mr. Williams, were they people who had been [221] working for Craftmaster immediately prior to the time Craftmaster stopped operating?

A. Yes, all the people attended the meeting and was hired back in, well, no, not all of them. The company did have about five or six people working

(Testimony of Ralph Royer.)

there all during the strike we had or all during the picket, I should say.

Trial Examiner: Were they members of your organization?

The Witness: They were not members of our organization.

Trial Examiner: We have gone up another little highway and let's get off of it.

I am referring to the people who went back to work or who went to work, after the meeting with Mr. Williams, were they people who had been working for Craftmaster just before it stopped operating.

The Witness: Yes. * * * * * [222]

Cross Examination

Q. (By Mr. Bassett): I think you said at the meeting that was held with the Teamsters by your members when Mr. Williams addressed them they took a vote after he addressed them and voted unanimously to go to work under a Warehousemen's agreement such as he had read to them?

A. I recommended that vote.

Q. You recommended that. And I think you said right after that while they were still there at that meeting they filled out forms?

A. The vote we took was at my own meeting. We didn't take no votes at Mr. Williams' meeting.

Q. Well, did they fill out any forms, then, at Mr. Williams' meeting?

(Testimony of Ralph Royer.)

A. Yes, some sort of a form.

Q. You don't know what it was?

A. I don't know, I didn't see it.

Q. You don't know that it was application for membership?

A. I didn't see it. I went down and was talking to Mr. Williams and some of the other people.

Q. Did you see any one pass these forms around?

A. One of the Teamsters had it, I don't recall his name now, [225] but he had them and they went up on the stage, the members did. I walked away from the members so it wouldn't have any bearing on them.

Q. Did you leave before your members left that meeting? A. Yes.

Trial Examiner: Did you sign a form?

The Witness: No. I put application in at the plant at the time the guys did but I didn't put no form in.

Mr. Bassett: I am sorry, I didn't hear that last.

Trial Examiner: Put in an application at that plant.

To whom?

The Witness: We all put in application.

Trial Examiner: Application for what?

The Witness: To work.

Trial Examiner: Did you sign any form for the Teamsters of any kind?

The Witness: No, I did not.

Q. (By Mr. Bassett): Do you know how many

(Testimony of Ralph Royer.)

of your members signed application, membership application, forms, on that day?

A. I think they all signed the forms, whether membership forms or not, they all signed.

Q. They all signed it?

Trial Examiner: Except you?

The Witness: That is right. * * * * * [226]

Trial Examiner: By the way, do you know about how many people of your members went back to work after this meeting with Mr. Williams?

The Witness: I think they all got back but 17 of them, as far as my records show. Some of them wasn't called back and some wouldn't go back. [227]
* * * * *

DONALD GRANGER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [232]

Q. (By Mr. Boyd): Your name?

A. Donald Granger.

Q. Where were you employed in January of 1956? A. Craftmaster.

Q. And in what capacity?

A. Upholsterer.

Q. How long had you been employed by them prior to that?

A. I originally started there in 1950, August.

Q. Did your work there terminate?

A. Yes, it terminated in January.

(Testimony of Donald Granger.)

Q. And do you recall the date on which it was terminated? A. The 10th.

Q. By what notification were you terminated?

A. Letter, slip.

Q. And by whom was it delivered to you?

A. Bill Moore.

Q. Who was Bill Moore?

A. He was the foreman.

Q. What, if anything, did he say to you when he delivered the slip to you?

A. All he says was he didn't know what would happen from here on out, just have to wait and see what the score would be.

Q. He was the foreman of Craftmaster at that time? A. Right.

Q. Did you have any further communication from Bill Moore? [233]

A. Well, he called, I believe it was, on a Tuesday—

Q. Let me get a calendar before you so that you will not be confused as to dates. January of 1956, Tuesday, the 10th was Tuesday, and you say that you were terminated on the 10th, Tuesday?

A. I believe he called that night.

Q. He called Tuesday night?

A. Yes. [234]

* * * * *

Q. (By Mr. Boyd): And what did he tell you?

A. He told me to come for an interview, to see Mr. Sparrowk.

Q. And did he say when you should see Mr.

(Testimony of Donald Granger.)

Sparrowk? A. On Wednesday.

Q. That was the next day? A. Yes.

Q. On the 11th of January? A. Yes.

Q. Did you do so? A. Yes.

Q. At what time did you see Mr. Sparrowk?

A. It was around, I'd say, 11 o'clock.

Q. Where did you see Mr. Sparrowk?

A. At Craftmaster.

Q. Where at Craftmaster did you see him?

A. In the office at the shop.

Q. Was this on the lower floor or the main or second floor? [235] A. The second floor.

Q. The second floor? A. Yes.

Q. Was he alone when you talked with him?

A. Mr. Sparrowk?

Q. Yes. A. Yes.

Q. Where in the plant was it that you talked with him?

A. It was one of the offices in the back of the plant.

Q. Were there other employees nearby at the time you talked with him?

A. Yes, there was.

Q. Where were they?

A. They was outside the office.

Q. Waiting outside as you had been waiting?

A. Yes.

Q. Now tell us of your conversation with Mr. Sparrowk, what did you say to him and what did he say to you?

A. Well, he asked if I was working and if I

(Testimony of Donald Granger.)

wanted to come back, and I said yes. Then I asked him how much, you know, the scale would be, and he said it would be the same, and then about the holidays and stuff like that, you know, pay. He said he didn't know for sure about them. Then he says I'd have to go down and clear through the Teamsters before I could go to work, and see Mr. Williams, I believe his name was. [236]

Q. Mr. Williams? A. Yes.

Q. Did he specify the address of the Teamsters that you would go to?

A. It is 522 Dennyway, I believe, Local 117.

Q. He did specify the local number?

A. Yes.

Trial Examiner: The question is did Mr. Sparrowk give you the address.

The Witness: Yes.

Q. (By Mr. Boyd): And your answer was, as you recall it, 522 Dennyway?

A. Yes; I believe it was.

Trial Examiner: Seattle?

The Witness: Seattle, Washington.

Q. (By Mr. Boyd): Did he make any explanation of why you should do that?

A. Well, he says they had some kind of agreement with the Teamsters, that they had been taken care of—I mean employees—that we were coming down to see them, I mean, I guess, that we was coming down.

Q. That Williams knew you were coming down?

A. Yes.

(Testimony of Donald Granger.)

Q. Was there any discussion between you and Mr. Sparrowk concerning dues or initiation fees?

A. He said there wouldn't be any.

Q. Wouldn't be any what?

A. Initiation fees.

Q. There wouldn't be any initiation fee?

A. Right.

Q. Was there any comment about the dues?

A. No, he didn't say anything.

Q. But he did tell you there would be no initiation fee? A. Yes.

Q. Did he explain why? A. No.

Q. What did you say to him when he made that statement?

A. I didn't say anything. I just wrote down the address, and I think I left then.

Q. And when you left where did you go?

A. I went down to the Upholsterers Union.

Q. Did you not go to the Teamsters Union?

A. No.

Q. When you went to the Upholsterers Union, what did you do when you got there?

A. I asked them what was the score. I was an upholsterer, I wasn't a truck driver, a teamster, what should I do.

Q. Were you advised what you should do?

A. Yes.

Q. What were you advised? [238]

A. Just don't sign up.

Q. Not to sign up? A. Yes. [239]

* * * * *

(Testimony of Donald Granger.)

Q. (By Mr. Boyd): Mr. Granger, I make available to you a document for your examination, briefly, and ask whether each of those three pages bear your signature. A. Yes.

Q. And is this the form of an affidavit which you made on the 17th day of January of 1956?

A. Yes, it is. [241]

* * * * *

Mr. Margolis: May I see the witness' statement, counsel?

Trial Examiner: Let the record show that the document from which the witness has refreshed his recollection has been handed to respondent company's counsel.

Did you ever return to work at the plant?

The Witness: You mean to do actual work?

Trial Examiner: Yes.

The Witness: No. [251]

* * * * *

Mr. Boyd: Definitely I expected to offer that the witness was offered a job and didn't take it so there would be no 8 (a) (3) involved as to this witness.

* * * * * [254]

Cross Examination

Q. (By Mr. Margolis): Mr. Granger, this affidavit that you signed was signed on January 17, 1956, is that correct? A. Yes.

Q. And that was here in this building at the offices of the National Labor Relations Board?

A. Right.

(Testimony of Donald Granger.)

Q. And in the presence of Mr. Nowell, a field examiner of the Labor Board?

A. That is right.

Q. And your recollection of what had transpired up until then was certainly clearer then than it is now?

A. That is right.

Q. Or at least as clear, is that correct?

A. Yes.

Q. And Mr. Nowell gave you the opportunity of making a complete statement to him?

A. Yes.

Q. And you read the affidavit before you signed it?

A. Yes, I did. [255]

Q. You felt that it was complete and accurate?

A. Yes, as far as I could remember.

Q. As to what had happened up until the 17th of January?

A. Yes.

Q. Did he give you the opportunity to make any changes, if you wanted to?

A. Yes, he did. [256]

* * * * *

Q. (By Mr. Margolis): Mr. Granger, this may be quite confusing to you, but I just want a simple answer to a simple question. This is a fact, is it not, that there is nothing contained in the affidavit that you have in your hand dated January 17 to the effect that Mr. Sparrowk had told you you should or you had to join the Teamsters Union on January 11, is that correct?

A. No, but he said we should go down there.

Q. The answer to my question, then, is that

(Testimony of Donald Granger.)

there is nothing in that affidavit to that effect, correct? A. Yes. [261]

* * * * *

Q. Did he say that the Teamsters were claiming that they had a master agreement that covered this plant? Or, if you don't recall, just say so.

A. I don't recall that for sure. [262]

* * * * *

Q. You don't recall. Did Mr. Sparrowk indicate to you that there was one agreement covering Englander plants or that there were several agreements with the Teamsters Union?

A. There was a master agreement that covered all of their businesses, plants.

Q. You were given to understand that there was just one? A. Yes.

Q. You had never seen the agreement?

A. No. [263]

* * * * *

Q. But you definitely recall that he did tell you on either or both of those occasions that the locals involved would have to settle their differences or arrive at some understanding?

A. No, I don't believe he said—you mean the first occasion when I had the interview?

Q. On either occasion, Mr. Granger.

A. You mean when I had the interview?

Q. Well, if you prefer to call it an interview. Either the 11th of January or the 16th.

A. On the 11th of January he didn't bring that up at all. [264]

(Testimony of Donald Granger.)

Q. But did he on the 16th?

A. Yes, I think that was brought up.

Q. By him? A. Sparrowk. [265]

* * * * *

Cross Examination

Q. (By Mr. Bassett): Mr. Granger, what are you doing now?

A. I am working for Seattle Pack.

Q. Seattle Pack? A. Yes.

Q. What do they do? A. Meat.

Q. How long have you worked there?

A. Since about the 25th of January. About the 25th of January, I guess.

Q. Who asked you to come here to the office of the National Labor Relations Board?

* * * * *

A. Ralph Royer. [266]

* * * * *

Q. Did Mr. Royer come with you?

A. Yes, he was here.

Q. Did someone else from the Upholsterers Union come with [267] you?

A. There was other employees with me.

Q. Mr. Royer brought several of them up here?

A. Yes.

Q. Now, who was in the room at the time that you gave your statement and to whom did you give it, do you remember the name of the man?

A. It was Mr. Nowell, I believe his name was.

Q. Nowell? A. Nowell.

(Testimony of Donald Granger.)

Q. He was in the room and Mr. Royer was in the room when you were talking to him?

A. Yes.

Q. Was there anyone else in the room?

A. Mr. Gord was.

Q. Al Gord. He is an official of the Upholsterers Union, is he? A. Yes. [268]

* * * * *

JEANETTE TESTERMAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): Your name is Jeanette Testerman? A. Yes.

Q. Where were you employed in January of 1956? A. Craftmaster.

Q. And until when?

A. The 9th of January.

Q. Directing your attention to the calendar for that month, did you say the 9th of January, which was Monday? A. Yes.

Q. When were you given notice of termination?

A. I got my termination in the mail on the 10th of January.

Q. And by whom?

A. Well, it was mailed from Craftmaster's.

Q. Thereafter did you get any further notification from Craftmaster concerning work to be had at that plant? A. Yes.

(Testimony of Jeanette Testerman.)

Q. And from whom? A. Bill Moore.

Q. And when?

A. The 10th of January, that evening.

Q. And by what means were you notified?

A. He called me on the phone.

Q. And what did he tell you?

A. He told me to come in for an interview either on Wednesday or Thursday.

Q. Now, did you go in? A. Yes.

Q. And when did you go in?

A. Wednesday morning.

Q. And with whom did you talk?

A. Mr. Sparrowk.

Q. And where?

A. In a small office in the back of the second floor.

Q. What was your conversation with Mr. Sparrowk?

A. He asked me what my name was and what I had been doing.

Q. Go ahead. What did he say—what developed in the conversation?

A. And he said there probably would be work there shortly, [280] after this inventory was taken, and he said I'd have to clear through Local 117 and see a Mr. Williams.

Trial Examiner: Now, keep your voice up. I could hardly hear what you are saying.

The Witness: Do you want me to repeat it?

Trial Examiner: Did you get it?

The Reporter: Yes, I did.

(Testimony of Jeanette Testerman.)

Trial Examiner: No, don't repeat it. As long as the reporter got it, that is all that is necessary.

All right, continue.

Q. (By Mr. Boyd): Did he explain that statement at all?

A. No; I didn't ask no questions or anything; I just walked out.

Q. What more did he tell you, if anything, at that time, Mrs. Testerman?

A. Nothing at that time that I remember.

Q. Then following that conversation with him what did you do?

A. I called the business agent of Local 3197.

Q. That was the Furniture Workers?

A. Yes.

Q. Had you been a member of the Furniture Workers? A. Well, for 14 years.

Q. Incidentally, are you employed at the present time? A. Yes.

Q. By whom? [281] A. Englander.

Q. By The Englander Company? A. Yes.

Q. And in that same plant?

A. Yes, sir.

Q. After your conversation with Mr. Sparrowk on January 11 and after you had called the business agent of the Furniture Workers, did you have any further contact with personnel at the plant or with Mr. Sparrowk, let me put it that way? Did you see Mr. Sparrowk again?

A. That day you mean?

Q. That day or thereafter.

(Testimony of Jeanette Testerman.)

A. Well, on the 16th of January I did, yes.

Q. And what transpired on the 16th of January?

A. Well, we all went in as a group down there and he talked to us.

Q. And what was it he said?

A. Well, he said that he was sorry that there was no work there at that time, that the inventory hadn't quite all been completed, and, anyway, until the unions were straightened out, because there was a picket line on at that time or had been.

Q. He made some allusion to the picket line?

A. I mean until the difficulty of the unions had been straightened out there wouldn't be work.

Q. What, if any, statement did he make at that time concerning [282] any union?

A. Well, there was questions brought up on the floor as to this master agreement that they have with the Teamsters, and he said as far as he knew that that would cover the Seattle plant, too.

Trial Examiner: Can you remember in words or substance any question put to Mr. Sparrowk about the master agreement? Put it this way: I understand that was brought up in the form of a question, is that correct?

The Witness: Yes. If I remember right, what is this about the master agreement that they have with the Teamsters?

Trial Examiner: Is that the way the question was put?

The Witness: Yes.

(Testimony of Jeanette Testerman.)

Trial Examiner: Do you remember who put the question?

The Witness: I don't remember, there was so many there.

Trial Examiner: Somebody in the group?

The Witness: Yes; either Local 5 or Local 3197 members.

Trial Examiner: Now, will you tell me what, if anything, Mr. Sparrowk replied in response to that question?

The Witness: Well, he said as far as he knew at that time that the master agreement would cover their plant here in Seattle. [283]

* * * * *

Q. (By Mr. Boyd): You have given us your recollection of those things which happened on January 16. Now, thereafter did you return to the plant?

A. We was down as a group on the 23rd.

Mr. Bassett: Will you please speak a little louder?

A. We was down as a group on the 23rd of January.

Q. (By Mr. Boyd): And what did you do at that time?

A. We filled in applications for work.

Q. Were there any conversations between yourself and Mr. Sparrowk—

A. (Interrupting) No.

Q. (Continuing) —or any occasion when Sparrowk addressed the group of employees?

(Testimony of Jeanette Testerman.)

A. Not at that time, as I recall.

Q. Following that date did you have any further contact from anyone concerning employment at the plant?

A. Nobody called me, no.

Q. Pardon?

A. Nobody from the plant called me, no.

Q. Well, did anyone else call you concerning employment at the plant? [286]

A. Well, on February 10 I got a call from Bombadier of the Teamsters.

Mr. Boyd: Can we have it stipulated that Mr. Bombadier holds a position comparable to Mr. Walters of the Teamsters?

Mr. Bassett: Yes.

Q. (By Mr. Boyd): Where did you receive that call and what was the content of the call?

A. I was home at the time he called.

Q. And what did he tell you?

Mr. Bassett: Just a minute. I stipulated to one thing, Mr. Bombadier is an assistant business agent. Now, this lady hasn't testified that she ever met him or knew his voice or anything of the kind.

Trial Examiner: No foundation.

Mr. Bassett: That is right, no foundation.

Q. (By Mr. Boyd): Do you know Mr. Bombadier?

A. Yes.

Q. Now?

A. Yes, I know him now.

Q. Have you talked with him on any occasions since that time?

A. Yes.

Q. Have you talked with him prior to that occasion?

A. No.

(Testimony of Jeanette Testerman.)

Q. On that occasion by what name did this caller identify himself? [287]

A. He said his name was Bombadier.

Q. Since the occasion of the telephone call have you had any opportunity or has there been any incident of your talking further with Bombadier?

A. About the phone call?

Q. Yes, about the phone call?

A. On Monday of February 13 I went down to the Teamsters Hall and I talked to him then.

Q. You talked to Bombadier then?

A. Yes.

Q. Will you identify Mr. Bombadier sitting here in the hearing room?

A. He is sitting right there (indicating).

Q. The first gentleman here to the right?

A. Yes.

Q. By virtue of having talked to Bombadier since that time are you able to say that the voice that you heard over the phone identifying himself as Bombadier was the voice of the gentleman whom you have just identified? A. Yes.

Q. Now, will you tell us what Mr. Bombadier told you in the telephone conversation on Friday, February 10?

Mr. Margolis: Mr. Examiner, could we have the same objection on behalf of the employer on the ground that this is a hearsay statement, not made in the employer's presence and [288] not binding on the respondent employer?

(Testimony of Jeanette Testerman.)

Trial Examiner: Well, I will take it as to the union.

Q. (By Mr. Boyd): Will you proceed, please?

A. What was the question?

Trial Examiner: What was the conversation with Mr. Bombadier on the telephone, that is the question.

A. Oh, he asked me if I wanted to go to work on the following Monday. I asked him if the labor dispute was straightened out and he said that they had a contract here and that as far as the picket line that we had on there, it wasn't a legal picket line.

Q. (By Mr. Boyd): The picket line that we had, and when you say we, you refer to whom?

A. The Furniture Workers.

Q. You were at that time still a member of the Furniture Workers? A. Yes.

Q. What did you say to Bombadier in concluding your conversation?

A. I didn't say any more—oh, I asked him if I could call him back.

Q. That concluded the conversation?

A. Yes.

Q. Did you make a report of that telephone conversation with him to anyone else? [289]

A. Yes.

Q. And to whom?

A. I reported it up here to the Labor Relations Board and to Carl Kissick.

Mr. Bassett: I can't hear.

(Testimony of Jeanette Testerman.)

Trial Examiner: Raise your voice, please.

A. I reported it to Carl Kissick and Bill Evans.

Q. (By Mr. Boyd): You say on the following Monday you had a conversation with Bombadier?

A. Yes.

Q. Let's find out what led up to that. When during the day was it that you talked to him?

Mr. Bassett: What day of the month?

The Witness: February 13.

Mr. Bassett: February 13.

Trial Examiner: Now, this is the second conversation with Mr. Bombadier, is that right?

The Witness: Yes. The first one was over the telephone.

Trial Examiner: Yes, all right.

Q. (By Mr. Boyd): And this was, you say, in the afternoon of Monday, the 13th? A. Yes.

Q. On that day and prior to the conversation with Bombadier had you been at the plant?

A. Yes. [290]

Q. And at what time had you gone to the plant?

A. Monday morning.

Q. Will you tell us what transpired that Monday morning?

A. Well, we all went in, or most of them went in as a group again. I mean there wasn't everybody that had worked there before because a lot of them had gone to work some other place.

Q. Did anyone accompany you who was not an applicant for employment? To put it another way, did anyone from your union accompany you?

(Testimony of Jeanette Testerman.)

A. Yes.

Q. Who?

A. Carl Kissick was there and Johnny——

Q. (Interrupting) That is John Truman?

A. Yes.

Q. All right, now tell us what transpired in the plant.

A. Well, we were all up on the second floor, and, as I recall, I think Sparrowk came out and said a few words to us about that they were about ready to open up for work. [291]

* * * * *

Q. Before talking with Bombadier did you have any further conversations, any other conversations, with your own union group? A. Yes.

Q. And when? A. Monday afternoon.

Q. Where?

A. In the office of 3197. [292]

* * * * *

Q. (By Mr. Boyd): You did go to the union hall. You did go and talk with your union representatives, as I understand, is that right?

A. Yes.

Q. What did you do thereafter? Or did you make any contact with either the union or the employer while at the office of the union? Let me put it that way. A. Yes, I did.

Q. And with whom?

A. I called Bill Moore to see if I had a job.

Q. Bill Moore? A. Yes. [293]

Q. Where did you call him?

(Testimony of Jeanette Testerman.)

A. At the shop.

Q. And about what time was it that you called Bill Moore?

A. That I couldn't—it was in the afternoon but what time I sure couldn't tell you.

Q. What did Moore tell you concerning whether you could get work?

A. He said I could go to work the next morning.

Q. Then what did you do?

A. I decided to go over and sign up with the Teamsters. [294]

* * * * *

Q. (By Mr. Boyd): Then what did you do?

A. I went over to their hall late that afternoon.

Q. And with whom did you talk?

A. I saw Mr. Bombadier and Mr. Williams, both. [295]

* * * * *

Q. (By Mr. Boyd): Will you relate, please, what your conversation was with Mr. Bombadier and with Mr. Williams?

A. Well, I couldn't remember everything we talked about. We talked about health and welfare plan that they have and the pension plan.

* * * * *

Trial Examiner: You said something about health and welfare?

The Witness: Yes, they explained their health and their welfare plan and their pension plan and explained to us that I [296] should fill in an appli-

(Testimony of Jeanette Testerman.)

cation, and I signed another slip of paper with everybody's name on that had signed up to go to work.

Q. (By Mr. Boyd): I hand you a document which for identification is marked General Counsel's Exhibit No. 9.

* * * * *

Q. (By Mr. Boyd): I will ask you to examine that and state whether that appears to you to be a true photostatic reproduction of the document that you have now referred to that was signed by several other people and which bears your signature.

A. Yes, that is my signature there (indicating).

Q. You point to your signature as being on the second page in the ninth line? A. Yes.

Mr. Boyd: I offer in evidence General Counsel's Exhibit 9.

Trial Examiner: While counsel are looking at it, were there any other people you recognized there who signed about the time you did?

The Witness: Yes.

Trial Examiner: Who else was there on that occasion?

The Witness: Harold Church was there and John Lanahan.

Trial Examiner: Did they also sign this document?

The Witness: Yes, they did.

Trial Examiner: Did you know them to be employees of Craftmaster? [297]

The Witness: Yes.

(Testimony of Jeanette Testerman.)

Trial Examiner: In what department were they working?

The Witness: Well, John Lanahan works in the warehouse part and Harold Church was an assembler or frame maker for the Craftmaster's, he used to be——

Trial Examiner: (Interrupting) Was that in the mill room that he worked?

The Witness: No, not in the mill room.

Trial Examiner: Did you know of your own knowledge, now, not what you heard, when these two individuals had been members of your union?

The Witness: Yes, I know they had been members of our union.

Trial Examiner: I am referring to the Furniture Workers.

The Witness: Yes.

* * * * *

[See Exhibit No. 9 at page 366.]

Q. (By Mr. Boyd): Are these people whom you have identified presently employed by Englander?

A. Yes.

Q. May I get specifically your best recollection of the time [298] of day and the precise date it was that you signed your name on this document?

A. It was Monday, the 13th, late in the afternoon. I think it was just about their closing time. I don't know whether that is 5:00 or 5:30. They were just about ready to close up, I know.

Trial Examiner: Who was ready to close up?

The Witness: The Teamsters.

(Testimony of Jeanette Testerman.)

Trial Examiner: How did you come to sign this document, General Counsel's 9?

The Witness: This here (indicating)?

Trial Examiner: Yes.

The Witness: Well, it was just one of the things you had to sign, I guess, to go to work, everybody else had signed it.

Mr. Margolis: Just a minute——

Trial Examiner: (Interrupting) I will strike the witness' testimony.

Did you ask for this or did they?

The Witness: No, I didn't ask for this.

Trial Examiner: Who gave it to you? Some person did, I assume.

The Witness: It was either Williams or Bombardier, I don't remember which one now, that handed it to me to sign. [299]

* * * * *

Mr. Boyd: May I at this time request the respondent union to make available to me the application for membership signed by Jeanette Testerman?

Mr. Bassett: I have it right here. I was going to examine her about it.

Q. (By Mr. Boyd): Mrs. Testerman, I hand you a document captioned "application blank," and which will be marked for identification, "G. C. 10."

* * * * *

Q. (By Mr. Boyd): Do you recognize that document and can you identify it?

A. Well, that is my writing on it.

(Testimony of Jeanette Testerman.)

Q. What do you identify it as being?

A. The application. [300]

* * * * *

Trial Examiner: When and where did you sign this?

The Witness: February 13, late in the afternoon.

Trial Examiner: The same time you signed General Counsel's 9?

The Witness: Yes. [301]

* * * * *

Q. (By Mr. Boyd): Was there a contract exhibited to you at that time? A. Yes.

Q. And by whom?

A. Bombadier brought it in.

Q. Was the document which was shown to you at that time one that was a signed document?

A. That I do not recall.

Q. You did not examine it to that extent? [302]

A. No, I didn't.

Q. What did Bombadier say to you concerning this document which he showed to you at that time?

* * * * *

A. I don't recall everything that was said about it.

Q. (By Mr. Boyd): Now, with regard to General Counsel's Exhibit 9 in evidence, which you did sign, you understood by that that you were subscribing to the heading that appeared on the top of each of these pages—

A. (Interrupting) Yes.

(Testimony of Jeanette Testerman.)

Q. (Continuing) —in General Counsel's 9 by signing it, did you not? A. Yes. [303]

* * * * *

[See Exhibit No. 10 at page 368.]

Q. (By Mr. Boyd): Following that afternoon's activity, what did you do the next day?

A. I went to work at noon. I went to a union meeting in the morning.

Q. To whose union meeting?

A. Local 3197.

Q. And that was your Furniture Workers Union? A. Yes. [304]

* * * * *

Trial Examiner: I grant you and there may be more but the basic issue is here whether or not the Teamsters and Englander jumped the gun. In other words, they entered into a contract when they should not have done so. I don't see how that issue can be altered or affected in the slightest by something that was said to this witness and other employees by officials of their own union. Section 7 doesn't deal with unions, it deals with the rights of employees, and these employees, if the theory of your case is correct, had a right to work in this plant uninhibited by any violations of Section 7. These are all peripheral details as to what happened in the inter-union communications, somebody over at the Furniture Local Union said it is okay, to paraphrase the testimony that has been given, you can go to work there, if you have to sign up with the Teamsters, do so under protest, something

(Testimony of Jeanette Testerman.)

of that sort, in effect can be testified, how can that affect the rights of your employees? [306]

* * * * *

Mr. Boyd: (Interrupting) I grant you that what their own union officials said to them is not binding upon either respondent but it does account for the action of the individual. [307]

* * * * *

Cross Examination

Q. (By Mr. Margolis): Mrs. Testerman, you had worked for the Craftmaster Corporation for about how long?

A. About four years, I think it was.

Q. Did you hold any office in Local 3197?

A. By office what——

Q. (Interrupting) Did you have any official capacity with Local 3197?

A. Well, I was the shop steward down at the shop.

Q. At the Craftmaster plant? A. Yes.

Q. Up until the severance of your employment there? A. Yes. [308]

* * * * *

Q. Yes, did he say that the Teamsters claimed that they had such a master agreement?

A. Not that I recall, no.

Q. Did you ever see any agreement covering that plant? A. Covering that plant?

Q. Yes, ma'am.

A. Not that I recall, no.

(Testimony of Jeanette Testerman.)

Q. Certainly Mr. Sparrowk did not display one to you? A. No. [313]

* * * * *

Cross Examination [315]

Q. (By Mr. Bassett): Did you attend any meetings at the Teamsters Building before February 13? A. No, I didn't.

Q. Now, you hadn't been up there at all before you signed the petition, General Counsel's Exhibit 9? A. Not to any of their meetings, no.

Q. Had you been to the building?

A. I had been in the building, yes.

Q. On what date? A. On January 11.

Q. And what was your mission on that day, what did you go there for?

A. I just went along with some of the other people that went up that day.

Q. How many went up?

A. I didn't count them.

Q. At whose request did you go there?

A. At nobody's request that day.

Q. Did you take those people up there?

A. No, I didn't.

Q. Well, about how many went with you?

A. I didn't count them.

Q. Well, could you say there were five or fifteen or twenty-five?

A. I don't have any idea how many there was.

Q. I am not asking you to be exact about it now, Mrs. Testerman. Just roughly. Was there five or twenty-five or fifty?

(Testimony of Jeanette Testerman.)

A. Well, there wasn't twenty-five, I know. Probably between five and ten.

Q. Between five and ten. What was your purpose in going up there on that day? That was the 11th, wasn't it, 11th of February?

A. Eleventh of January.

Q. Eleventh of January. What was your purpose of going there on that day?

A. Well, I went up with the idea that I would see what the deal was on their contract and everything, and I changed my mind after I got up there, I didn't go in and talk to them.

Q. You didn't go in the building at all?

A. I was in the building but I didn't go in to talk to anybody that day.

Q. Did the other people meet some of the officials of Local 117? A. Yes. [317]

* * * * *

Q. You say after you got there you changed your mind about talking to any one?

A. Yes. [318]

* * * * *

Trial Examiner: Why did you change your mind?

The Witness: Well, before I went up to the hall I had talked to Carl Kissick and he said not to sign anything.

* * * * *

Q. (By Mr. Bassett): Carl Kissick, is he an official of your local union? A. Yes, he is.

* * * * *

(Testimony of Jeanette Testerman.)

Q. Of the Furniture Workers Union?

A. Yes. [319]

* * * * *

Q. (By Mr. Bassett): What was it he said to you before you went up to the Teamsters Building?

A. He said I just shouldn't sign any papers that day.

* * * * *

Q. Now, do I understand you correctly that before you went up there on the 13th you had decided to sign up with Local 117? A. Yes.

Trial Examiner: When did you make that decision, by the way?

The Witness: That afternoon.

Q. (By Mr. Bassett): This General Counsel's Exhibit 10 is filled in in your own handwriting, is it not? A. Yes.

Q. The statements contained in it are all true, are they? A. Yes.

Q. When this was presented to you did you have any objection [322] to signing it?

A. Well, I——

Q. (Interrupting) Did you do it voluntarily?

Mr. Boyd: Which question do you want her to answer?

Mr. Bassett: Either one, I don't care, that is what I am trying to find out.

Q. (By Mr. Bassett): Was it voluntary or did somebody force you to sign it?

A. I don't think anybody forced me to sign anything yet.

(Testimony of Jeanette Testerman.)

Q. You did it voluntarily, then, I take it?

A. Well, I guess so.

Q. Now referring to General Counsel's Exhibit 9, did you read the typewriting at the top of the page before you signed it? A. Yes, I did.

Q. And you signed that voluntarily, did you not? A. Yes.

Q. On that day, February 13, I think you said that either Mr. Williams or Mr. Bombadier explained to you the merits of their health and welfare program and their pension plan?

A. Yes, they did.

Q. Did they explain to you anything else in connection with the contract that they hoped to have with Englander, like vacations, wages?

A. Yes.

Q. Did they tell you at that time that they had a contract [323] with Englander in other states?

A. Yes, they did.

Q. And they told you that in making the explanations that you have testified about?

A. Yes.

Q. At the same time? A. Yes.

Mr. Bassett: I have no further questions.

Redirect Examination

Q. (By Mr. Boyd): Mrs. Testerman, in order that your answers may be understood, and with respect to the date of January 11, when you first went up to the Teamsters Hall, when did you go to the Teamsters Hall in relation to the time when

(Testimony of Jeanette Testerman.)

you talked with Mr. Sparrowk, before or after?

A. After.

Q. And you have testified that you went up there in the company of some other people?

A. Yes.

Q. You have testified that when you went up there you went up there intending, as you were going up there you were intending to sign up, was that it?

A. No, I was not intending to sign up. The others girls were.

Q. You have testified, though, that you were instructed or informed by your own union representative Kissick that you were not to sign anything?

A. That is right.

Q. Where did he give you that instruction?

A. Over the telephone.

Q. Over the telephone, before you went up there or after you arrived there?

A. Yes, before I went up.

Mr. Boyd: Very well.

Trial Examiner: With respect to your conversation with Mr. Sparrowk when did you talk with Mr. Kissick?

The Witness: After I had talked to Mr. Sparrowk.

Trial Examiner: Why did you call Mr. Kissick?

The Witness: Well, I just couldn't see why we had to sign up with the Teamsters when we were Furniture Workers Local and it was still going to be Furniture.

(Testimony of Jeanette Testerman.)

Trial Examiner: Incidentally, what was your classification in your plant when you worked for Craftmaster, or put it this way, what work did you do, tell me very briefly?

The Witness: Well, I worked on machines for a couple of years and at the last I was an assembler.

Trial Examiner: An assembler?

The Witness: Yes.

Trial Examiner: What does an assembler do?

The Witness: Put frames together, like the seats and backs for the furniture and then puts them together and makes the frames for upholstered furniture. [325]

Trial Examiner: Is that the work you are doing for Englander today?

The Witness: Yes.

Trial Examiner: And is that the capacity in which you went back to work in the plant? [326]

The Witness: Yes. * * * * *

Recross Examination

Q. (By Mr. Bassett): Were the people who went with you to the Teamsters Hall on the 11th of January all women?

A. That went with me, yes. There was some men there, though.

Q. There were some men? A. Yes.

Q. They didn't go along with you?

A. No, they weren't with me. * * * * * [327]

Q. (By Mr. Bassett): Did they tell you imme-

(Testimony of Jeanette Testerman.)

diately before they left the office of Local 117 or left the building that they had signed? A. Yes.

* * * * * [329]

MARVIN BALE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

Mr. Boyd: I will heed the Trial Examiner's suggestion. I expect with subsequent witnesses to develop variations. May I inform the Trial Examiner that this witness has an impediment in his speech due to a throat injury.

Direct Examination

Q. (By Mr. Boyd): Your name is Marvin Bale and you speak so that I can hear you, if you can?

A. That is right. [332]

Q. Were you in the employ of the Craftmaster before January 10 of 1956? A. That is right.

Q. Were you actually working in the week in which January 10 fell? A. No, I wasn't.

Q. Did you receive any notification of termination of your employment, and, if so, on what date?

A. I received it in the mail on the 10th.

Q. What did you do on the 11th, after having received this on the 10th?

A. I went over to the plant. You see, I live right close and I went over to the plant.

Q. With whom did you talk at the plant?

A. To some of the workmen, different ones that

(Testimony of Marvin Bale.)

were around working, ones that I had worked with, I talked to them.

Mr. Boyd: I didn't hear him.

Trial Examiner: He spoke to different workmen around the plant whom he had worked with.

Q. (By Mr. Boyd): Did you talk with any other person other than the workmen?

A. I talked to Mr. Sparrowk.

Q. Did you go in and talk with Mr. Sparrowk?

A. Not right away.

Q. Did you in the course of that day? [333]

A. Yes, I did.

Q. And where did you talk with Sparrowk?

A. On the second floor in the foreman's office.

Q. What was your conversation with Sparrowk?

A. Sparrowk asked me my name and I told him my name.

Q. And then what?

A. And then he told me his name, also he told me his name at the same time.

Q. And then what was your further conversation?

A. Then he taken my address, and he said you are from the south, your brogue sounds like you are from the south, which I said that is true, I am from Houston, Texas.

Q. Then what further conversation did you have with him?

A. Then he asked me if the work I had done paralleled before Englander taken over the plant.

Q. The work you had done for Craftmaster?

(Testimony of Marvin Bale.)

A. Yes.

Q. You told him that?

A. Yes, I told him what I had done.

Q. What further conversation?

A. Then he told me about joining the Teamsters Union.

Trial Examiner: What did he say about that? I mean give us his words as nearly as you can remember them. If you have a recollection, just give us your best recollection.

A. My work, what I done? [334]

Trial Examiner: No, in connection, you see, you said he spoke about joining the Teamsters Union. What I would like to know is what he said about it, his words.

The Witness: He told me had I joined the Teamsters Union and I said, "No, I haven't." He said that is what I should do, join the Teamsters Union, if I wanted to work here.

Trial Examiner: Did you just testify if you wanted to work there?

The Witness: Yes.

Trial Examiner: The witness' words, as I got them, were if I wanted to work there.

Q. (By Mr. Boyd): What response did you make to that remark?

A. I told him I belonged to the Wood Workers and I'd rather keep up with the Wood Workers.

Q. And what answer did he make to that when you made that response?

A. Then he insisted the Teamsters again and

(Testimony of Marvin Bale.)

gave the address of the Teamsters on Dennyway.

Q. He gave you the address of the Teamsters on Dennyway? A. Yes.

Q. I hand you a document, which for identification is marked General Counsel's Exhibit No. 11.

A. That is by my request, you see, I am short on my education, you see, that is by my request I asked him.

Q. That is, you requested that he give you in writing the [335] address? A. Yes.

Q. Is that right? A. Yes.

Q. Is this the document that he gave you at that time? A. It is.

* * * * *

Q. Excluding the writing in pen on the top, where the name Marvin Bale appears, and excluding the writing in the lower right-hand corner where the word "Sparet" appears, is this document in pencil, the written document that he gave you at that time? A. Yes, it is.

[See Exhibit No. 11 at page 370.] [336]

* * * * *

Q. (By Mr. Boyd): Did you go to the Teamsters Hall then?

A. No, I didn't go to the Teamsters Hall until about the 24th of January, and I went on my own.

Q. On what date?

A. About the 25th of January. [337]

Q. Of January? A. Yes.

Q. What did you do at that time when you went to the Teamsters Hall?

(Testimony of Marvin Bale.)

A. I wanted to find out about the application, about joining the Teamsters.

* * * * *

Q. (By Mr. Boyd): What more did you do other than make that inquiry, Mr. Bale?

A. I didn't sign anything.

Q. You just made the inquiry?

A. I just made the inquiry.

Q. Since that time have you returned to work at that plant and for the Englander Company?

A. Yes, but after, after the union had decided for its members to go ahead and join the union.

Q. That is, after your own union told you to go down and do that? A. Yes.

Q. That was the Furniture Workers Union?

A. That is right.

Q. When did the Furniture Workers Union tell you to go down and do that?

A. It was on the 13th.

* * * * *

Q. Directing your attention to this document, which is in evidence as General Counsel's Exhibit No. 9, I will ask you whether you signed this, signed your name on the second page thereof, on the eighteenth line, did you do so? [339]

A. Yes.

Q. Now, when did you sign the document?

A. That was on the 13th I signed that.

Q. Did you sign it on Monday, the 13th, this document?

(Testimony of Marvin Bale.)

A. Yes. It wasn't on Monday, I don't think—yes, it is.

Q. Monday was the 13th, Tuesday was the 14th.

A. That is right.

Q. Which date was it that you signed it?

A. Now, wait a minute, it was on the 14th.

Q. It was on the 14th that you signed it?

A. Yes, it was on the 14th.

Q. When had you received this instruction from the union? A. It was on the 14th I received it.

Mr. Boyd: That is all. We pass the witness.

Trial Examiner: Was that at a meeting?

The Witness: Yes, it was at a meeting.

Trial Examiner: Was Mr. John Truman there?

The Witness: Yes, he was.

* * * * *

Cross Examination

Q. (By Mr. Margolis): This first conversation you had with [340] Mr. Sparrowk was on January 11, correct? A. That is right.

Q. You did not take on membership in the Teamsters Union, Local 117, Warehousemen's Union until February 13? A. Make it 14.

Q. February 14? A. Yes.

Q. And you didn't feel that you had to until you had talked to your own union representatives, is that correct? A. That is right.

Q. And you talked to them on February 13?

A. I talked to them right after Sparrowk and I had our talk, talk in the foreman's office.

Q. No, but you talked to your own union people

(Testimony of Marvin Bale.)

just before you signed up with the Teamsters, didn't you?

A. Oh, yes, we had a meeting that morning.

Q. And that is when you decided you would join up? A. The union requested.

Q. So that's when you made your decision?

A. That's right.

Q. And not until then?

A. I went in a group.

Q. But not until then? A. Right. [341]

* * * * *

JOSEPHINE GRIFFIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Boyd): You will state your name?

A. Josephine Griffin.

Q. Where are you employed at the present time?

A. Englander's.

Q. When did you start in the employment of Englander? A. The 16th of February. [342]

* * * * *

Q. (By Mr. Boyd): When did you apply first for employment?

A. On February 13 I went to Englander's and picked up an application for employment, and I left, and the next day I came back, after I had taken it home and filled it out and the next morning I handed it in.

(Testimony of Josephine Griffin.)

Q. So you handed it in on February 14?

A. February 14, yes.

Q. Prior to that time had you ever worked for Englander or Craftmaster? A. No, I hadn't.

Q. For what type of work were you applying for employment?

A. Well, I had worked at Lynch Manufacturing, another furniture company, I had worked on a doweling machine.

Q. You were a doweling machine operator?

A. Yes.

Trial Examiner: What does that do, briefly?

The Witness: It puts the glue in the holes and the dowels are put in with this machine, the gluing of the dowels.

Q. (By Mr. Boyd): This is a so-called furniture workers operation instead of an upholsterers operation? A. Yes, it is.

Q. Now, on the 14th, having filled out the application the night before, what did you do?

A. What did I do on the 14th? [343]

Q. Yes.

A. I came in that morning and I handed in the application to the girl at the desk and then she said I could wait and see Bill Moore, so I sat down and waited. It was quite a while before I got to see him, but in the meantime she called on the phone somewhere in the factory and got ahold of him and told him that Josephine Griffin was there and that I had worked for a furniture factory, Lynch Furniture factory—

(Testimony of Josephine Griffin.)

Q. (Interrupting) Did Mr. Moore come?

A. Yes, after a while.

Q. Will you tell us, please, what your conversation with Mr. Moore was instead of what the girl was telling Moore over a telephone?

Mr. Margolis: Mr. Examiner, I object to this testimony on the ground that there is no showing that Mr. Moore had any authority to represent the company with reference to matters relating to labor negotiations.

Trial Examiner: I am not sure we are going to have that.

Mr. Margolis: It would still be hearsay, Mr. Examiner.

Trial Examiner: I will take the testimony. I believe there is evidence here about Mr. Moore's functions. I will overrule the objection.

Q. (By Mr. Boyd): Did you talk with Mr. Moore? A. Yes, I did.

Q. Incidentally, what was Mr. Moore's job on that date, if [344] you knew?

A. Foreman, I understood.

Q. Will you tell us what was said, please, between you and Mr. Moore on that date?

Mr. Margolis: Same objection, Mr. Examiner.

Trial Examiner: Overruled.

* * * * *

A. Well, I came into the office, I was sitting there in the office, and he asked me if I was the one who was waiting to see him, and I walked up to the counter, he looked over my application, and

(Testimony of Josephine Griffin.)

he said we have a job for you, we have a dowlings machine, and you could start work tomorrow morning, but first you have to get it straightened out with the Teamsters, and I said, "do you mean it isn't settled yet, it is not going to be Furniture Workers?" He said, "Well, it isn't settled yet one way or the other." Then I don't know just what else was said, but I said, "You mean I've got a job if I join the Teamsters?" and he said yes.

Q. Was that the extent of your conversation with Moore at that time? A. Yes.

Q. What did you do, then, after talking with Moore?

A. Then I didn't know what to do so I went to see Carl Kissick of the Furniture Workers Union and told him what happened, and [345] I told him I didn't know what to do about it, I needed a job, but I didn't know what to do since they told me to join the Teamsters, and he had told me to go down there, that there might be a chance of a job, so——

Trial Examiner (interrupting): He had told you to go down where?

The Witness: To Englander's.

Trial Examiner: He is the one who had sent you, I understand?

The Witness: Yes.

A. (continuing) ——so I asked him what to do and he said "go ahead and join the Teamsters," so I did.

Q. (By Mr. Boyd): And when did you do that?

(Testimony of Josephine Griffin.)

A. That was on February 14.

Q. When during the day did you go to the Teamsters office? A. About 10:00 o'clock.

Q. All right, now, with whom did you talk at the Teamsters office?

A. I talked to a woman in the office. I didn't see anybody else but some clerk, woman, I don't know what she was.

Q. And when you went there what did you say and do after you went there?

A. I told her that I had a job at the Englander Company and that I was told to come to the Teamsters Union Hall and fill out an application for membership. [346]

Q. And did you do that then?

A. I did. She give me an application blank and I filled it out. [347]

* * * * *

Q. (By Mr. Boyd): Referring now to this document in evidence, which is General Counsel's No. 9, and directing your attention to the fourth line on the second page, do you find there your signature? A. Yes.

Q. Will you state on what date, to your best recollection, you signed your name on this document? A. February 14.

Q. February 14? A. Yes.

Mr. Boyd: I pass the witness.

Trial Examiner: Who asked you to sign it, if anybody? [352]

The Witness: As soon as I got through filling

(Testimony of Josephine Griffin.)

out the application for membership to the Teamsters, in the Teamsters, she handed me a paper with some names on it and asked me to sign that.

* * * * *

Cross Examination

Q. (By Mr. Margolis): Mrs. Griffin, during your conversation with Bill Moore on February 13 he gave you to understand that there had been and was still in existence some controversy between Local 3197 and Local 117, correct? A. Yes.

Q. The controversy involving which union would have jurisdiction over the people in the plant, correct? A. Yes.

Q. And he told you at that time that the controversy had not been settled yet one way or the other? A. That is right.

Q. And you decided to become a member of Local 117, not until you spoke to Mr. Kissick, which was after you spoke to Mr. Moore, is that correct?

A. That is right. [353]

* * * * *

Trial Examiner: By the way, were you a member of the Furniture Workers Union at the time you went to apply for work the first time at Englander?

The Witness: Yes.

Trial Examiner: What local?

The Witness: 3197.

* * * * *

ROBERT A. McDONALD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): Where were you employed, if at all, the fore part of January, 1956? [356]

A. Craftmaster.

Q. In what capacity?

A. Packing and a little bit of shipping work.

Q. Your place of work was in what part of the factory?

A. The second floor, right around the shipping room itself.

Q. When did your employment with Craftmaster terminate?

A. That would be Friday, January 13, at midnight.

Q. Were you actually employed at the plant up until that time? A. Yes.

Q. What were you employed in doing during the period between January 11 and January 13?

A. Inventory.

Q. Did you at that time seek employment with the acquiring company, the Englander Company?

A. No.

Q. Did you at a later time seek employment?

A. Yes.

Q. When?

A. February 20, at 1:30 in the afternoon.

Mr. Bassett: February what?

(Testimony of Robert A. McDonald.)

The Witness: February 20.

Q. (By Mr. Boyd): Had you had employment in the meantime? A. Yes.

Q. Was it full-time employment? A. Yes.

Q. Up until February 20? A. Yes, it was.

Q. And by whom were you employed in that interim period? A. C. Hearst Chevron.

Q. Now, what took place on February 20?

A. I went to the Englander Company and made out application with "Red" Henry.

Q. Who was "Red" Henry?

A. He was the head shipping clerk.

Q. Had he been in the employ of the predecessor company, the Craftmaster Company that had been there before?

A. Yes, in the same capacity.

Q. You say you made out an application. Did you do anything further about it at that time?

A. At that time "Red" Henry had told me there was no job available so I left and went home.

Q. Did you leave the application there?

A. Yes.

Q. And with whom? A. With "Red".

Q. What developed thereafter?

A. The 21st, the following day, at 8:00 o'clock at night, "Red" Henry called me at my home and told me there was a job available.

Mr. Margolis: Just a minute, Mr. Examiner, here we are [358] getting down into an even lower echelon of command as far as the employer is concerned. I object to any testimony concerning what

(Testimony of Robert A. McDonald.)

"Red" Henry told this witness on the ground that it could not be binding on the employer on the ground that he had no authority to do so.

Trial Examiner: He needn't have authority to do such but I agree that there is lack of foundation thus far.

Mr. Boyd: The thing has to develop through the higher echelon they are talking about.

* * * * *

Trial Examiner: Who gave you your instructions when you were employed by Craftmaster, who was your boss?

The Witness: When I was at Craftmaster my boss was "Red" Henry.

Trial Examiner: And what did he do to supervise you?

The Witness: He was the one who told us the pieces of furniture to be packed and in what way to pack them and what to do with them. [359]

* * * * *

Q. (By Mr. Boyd): What was it that Henry informed you when he called that evening?

A. That there is a job available for me but he mentioned I would have to clear through the Teamsters. I told him I would like to think it over and made an appointment with him for 4:45 the following Thursday, and I was never contacted again until I went to the Englander or Craftmaster plant on Thursday. At that time I talked to Bill Moore.

(Testimony of Robert A. McDonald.)

Q. What was Bill Moore's job at that time, if you know?

A. As he put it to me, he was in charge of personnel.

Q. Very well, go ahead.

A. He told me what my job would be, it would be packing mattresses and putting covers on box springs, which I would be familiar with. He told me I would have to join the Teamsters and I flatly refused. I says, "Why join the Teamsters when the Carpenters & Joiners have the furniture plants?" * * * * *

Q. (By Mr. Boyd): What more was said by him or by you?

A. He said, "Let's put it another way." He said, "Why should you be the only one not to join the Teamsters when everybody else has?" I told him again I refuse to join the Teamsters. He says, "Well, I guess we can't do any business, that will be [360] about it."

Q. Was that the end of your conversation?

A. Yes, it was.

Mr. Boyd: I pass the witness.

Cross Examination

Q. (By Mr. Margolis): You worked up until February 20 at the Chevron station, Mr. McDonald, is that right? A. Yes, sir, I did.

Q. What has your employment been since then?

A. When I refused to join the Teamsters I went to work part-time for Lynch. [361] * * * * *

(Testimony of Robert A. McDonald.)

Q. (By Mr. Margolis): Are you working at the present time? A. Yes, I am.

Q. Where are you working?

A. I am working for Safeway.

Q. Not in the furniture workers craft, I take it?

A. No, sir.

Q. Did you ever have occasion to talk to Mr. Sparrowk? A. No, sir, I didn't.

Q. Have you ever talked to him?

A. No.

Mr. Margolis: I think that is all.

Cross Examination

Q. (By Mr. Bassett): You have never talked with anyone connected with Warehousemen's Union Local 117? A. No.

Mr. Bassett: That is all.

Mr. Boyd: That is all.

Trial Examiner: Who hired you when you went to work for Craftmaster?

The Witness: Bill Moore hired me. There is one thing I [362] would like to add, during the interview with Bill Moore——

Trial Examiner (interrupting): Which interview?

The Witness: The one that was down in the basement on Thursday at 4:45.

Trial Examiner: All right.

The Witness: I talked to him and he explained the job to me. I knew I could handle it and he told me then that as far as Englander and I are

(Testimony of Robert A. McDonald.)

concerned, you have a job at \$1.82½. From there we went into the situation of the Teamsters when I refused to join. [363]

* * * * *

Trial Examiner: Were you a member of the Carpenters Union, I mean with this Furniture Workers Union, at the time you had this conversation with Moore on this Thursday?

The Witness: Yes, sir.

Trial Examiner: Had you been a member of that organization when you worked for Craftmaster?

The Witness: Yes, sir, I was. [364]

* * * * *

FRED ROBER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): Were you employed prior to January 10, 1956, and, if so, by whom?

A. I was with Craftmaster for 17 years.

Q. In what capacity were you employed there?

A. Three or four different capacities. [365]

Q. The last job?

A. I was on the shipping floor, assistant shipping clerk.

Q. When did your work with Craftmaster terminate?

(Testimony of Fred Rober.)

A. January 13, 9 o'clock, Friday morning, when I was pulled off the job by my district agent.

* * * * *

Q. (By Mr. Boyd): What did you do immediately thereafter?

A. Well, I went out on the street. They said they had a picket line. Our own picket line was out there then, out on the street.

Q. Did you have any responsibility with reference to the picket line thereafter?

A. I did, sir.

Q. What was that? A. Picket captain.

Q. Were you again inside the plant on the following Monday?

A. Yes, the whole gang, whole crew of Craft-master, was in there at that time. [366]

* * * * *

Q. (By Mr. Boyd): Did you thereafter get employment with The Englander Company?

A. Not right away.

Trial Examiner: Well, the question is did you.

The Witness: Oh, yes, I am working for them now.

Q. (By Mr. Boyd): When did you start to work for them?

A. It was on the 14th of February, at 12:30.

Q. When were you informed by the company that you were employed?

A. We went down that Monday, when they had the session down there with all the employees. I

(Testimony of Fred Rober.)

talked with —“Red” Henry was my foreman then. He was on the shipping floor, as you heard before. I asked him if there was a job for me and he said yes, but you’d have to join with the Teamsters before you could go to work here.

Q. This is “Red” Henry who told you this on Monday? A. Yes.

Mr. Margolis: Pardon me. I move to strike the response [367] of the witness concerning what “Red” Henry told him on the ground that it is hearsay and there is no foundation shown for Mr. Henry to speak for the company in that connection.

Trial Examiner: Of course, you know, we know what Henry did when he worked for Craftmaster. There is evidence that he was a supervisor within the meaning of the Act at that time he hired, at least the one witness who preceded this one, but let’s put the horse where it belongs in the cart before we go into this kind of thing.

* * * * *

Q. (By Mr. Boyd): Since that time you have been employed in what department?

A. Shipping.

Q. Under whose supervision?

A. “Red” Henry.

Q. Now, will you describe to us, please, and for the record, what is the nature of his job.

A. Well, “Red” Henry is the shipping foreman. He makes out the bills of all furniture that goes out to the shipping doors. He also tells the fel-

(Testimony of Fred Rober.)

lows in the packing department how to pack it and what to pack and where it has to go.

Q. How many people does he have working under him, if you know?

A. There's three packers and there's two of us on the shipping [368] floor also. That makes five.

Q. That is five—— A. Yes.

Q. (Continuing) ——that are under his direction? A. Under his supervision.

* * * * *

Q. Who gives you permission for time off?

A. "Red" Henry.

Q. To whom do you take your grievances, if you have grievances? A. Mr. Henry.

Q. To whom do you make application for increase in pay, if there be such occasion?

A. Mr. Henry.

Trial Examiner: Have you such an application to him?

The Witness: No, not yet.

Q. (By Mr. Boyd): You had done so when you had worked for Henry before, is that it?

A. Yes, I have, that's right. [369]

* * * * *

Trial Examiner: Had you made any application for employment before then?

The Witness: I filled out an application form down there at Englander before then.

Trial Examiner: Did you talk to Henry after that? [370]

The Witness: I talked to him after that, too,

(Testimony of Fred Rober.)

because he knew what I could do on the shipping floor.

Trial Examiner: No, no, did you talk to him?

The Witness: "Red" Henry?

Trial Examiner: Yes.

The Witness: Yes, I did.

Trial Examiner: How did you come to be present with him and Moore?

The Witness: They were all on the shipping floor at the same time there.

Trial Examiner: Was this the time you talked with him after you filed your application?

The Witness: Right afterwards, about a week afterwards.

Trial Examiner: All right, tell me what took place on this occasion when you spoke to Mr. Moore in Henry's presence.

The Witness: They were there and I asked him.

Trial Examiner: Asked who?

The Witness: I asked "Red" Henry and Bill Moore. They said there would be a job on the shipping floor but I'd have to clear through the Teamsters.

Trial Examiner: Who said that?

The Witness: Bill Moore and "Red" Henry both.

Q. (By Mr. Boyd): This was on what date?

A. The 13th of February.

Q. What action did you take thereafter? [371]

A. Well, that day I stayed around for a little while and then I went home.

(Testimony of Fred Rober.)

Q. On the following day what occurred?

A. On the following day at 10 o'clock I went down to our union hall where we had a meeting. There we were advised that if we wanted to work we'd have to join up with the Teamsters regardless, one way or the other to get work.

Q. What did you do?

A. So there was 11 of us went up to the Teamsters Hall. We signed slips with our names, addresses, where we worked before, our beneficiaries, signed it, and on the top it says five and a quarter for initiation fees.

Q. Did you pay the initiation fee?

A. Not at that time. They told me I could pay it the next week when I had a pay check.

Q. Did you sign anything other than the application form?

A. I also signed a paper on the right-hand side.

Q. I show you a document which is marked for Identification General Counsel's Exhibit 9 and direct your attention to where the name "Fred Rober" appears in the fifteenth line.

A. That is right.

Q. Is that your signature?

A. That is my signature.

Q. Who, of these people whose names appear immediately before and immediately after your name, signed that document in your [372] presence?

A. George Mertel, George Rushton, Marvin

(Testimony of Fred Rober.)

Bale, Fred Randall, Walter Tjaden, Jesse Dennis, Adolph Olson, and Leo O'Hare.

Mr. Boyd: I pass the witness.

Trial Examiner: How did you come to go to work at The Englander Company?

The Witness: That was my job. I don't know much of anything else.

Trial Examiner: I mean you were at the union hall. What did you do after that, if anything?

The Witness: I went right down there; it was 12:30, I went to work down there.

Trial Examiner: Was this on the same day you signed up with the Teamsters?

The Witness: The same day.

Trial Examiner: Did you have any conversation with either Mr. Henry or Mr. Moore?

The Witness: No, not at that time. I went right up on the shipping floor. It was about 10 minutes before 12:30. 12:30 I went to work on the job, the same job as when I left, when I was pulled off the job.

Trial Examiner: I take it you had no conversation with anybody at all before you began to work there that day?

The Witness: No, sir.

Trial Examiner: I mean at the plant with Mr. Henry or Mr. [373] Moore?

The Witness: No, because I knew what I had to do.

Trial Examiner: Don't give us any because. I will strike his "because".

(Testimony of Fred Rober.)

Had you been a member of any labor organization up to the time you signed with the Teamsters?

The Witness: Just 3197, Furniture Workers.

Trial Examiner: Had you been a member of that organization when you worked for Craftmaster?

The Witness: Yes, sir. [374]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Margolis): This conversation you had with Henry was on February 13? A. Yes.

Q. Are you positive that Mr. Moore was present during that entire conversation?

A. Yes, he was there and he walked away and said he had something else to do.

Q. And you continued talking with Mr. Henry?

A. A few minutes.

Q. So Mr. Moore was not there throughout the conversation?

A. Not complete, but he heard what I said to start with. [376]

* * * * *

Cross Examination

Q. (By Mr. Bassett): Mr. Rober, who persuaded you to join the Warehousemen's Union, Local 117?

A. When we had our meeting, the Furniture Workers, they said it would be best to join, to get all of our members that we could into that plant.

Q. Up until that time you did not want to join the Teamsters Union?

A. Who said I didn't want to join?

(Testimony of Fred Rober.)

Q. You did, I take it, didn't you? Didn't you say you refused?

A. We was waiting to see how this outcome came about.

Q. Mr. Rober, didn't you say you refused to join?

A. I didn't say I refused. I didn't say a word like it.

Q. You didn't? A. No. [381]

Q. What did you tell Mr. Moore and Mr. Henry? A. What did I tell them?

Q. Yes.

A. I never told them that I would refuse to join anything.

Q. What did you say?

A. I didn't say anything. I just asked them if there was a job available but that is not I refused.

Q. But you made no response at all when they said to you that you should join the Teamsters Union?

A. I said, "Well, wait until we have our Furniture Workers' meeting."

Q. Is that what you told them?

A. That is what I told them.

Q. At any rate, you were not willing to go up there and join the Teamsters Union until you had your union meeting and they instructed you to do it?

A. I wanted to find out what the score was at that time. * * * * * [382]

Q. (By Mr. Bassett): You were not willing to become a member of Local 117 until you had your

(Testimony of Fred Rober.)

meeting and your union instructed you to become a member of Local 117, is that right?

A. That is what I was waiting for.

Q. Yes, sir, you were waiting for instructions from your union?

Trial Examiner: Is that right?

A. Yes, sir.

Q. (By Mr. Bassett): And you are a member of the Woodworkers Local 3197?

A. That is right.

Q. During the entire time that the picketing was going on at the plant by your union you were the picket captain? A. That is right.

Q. Out on the line there with them?

A. That is right.

Q. You have attended all sessions of the hearing of this case? A. That is right. [383]

* * * * *

Cross Examination

Q. (By Mr. Margolis): Did you attend all union meetings of Local 3197 after this controversy arose with the Warehousemen's Union?

A. I was down Monday—every Monday I was down there on the shipping floor.

Q. Where was the union meeting you spoke of?

A. A.F. of L. hall.

Q. You attended that?

A. That is right, sir.

Q. At that time were all of the members of your local who were employed at this plant in attendance? A. No, not all of them.

(Testimony of Fred Rober.)

Q. Most of them?

A. Most of them, sir.

Q. Most of them? [384] A. That is right.

Q. And it was directly following that meeting that you went up and signed up with Local 117?

A. That is right.

Q. How many was there?

A. Eleven of us went up.

Q. Was there a vote taken at that meeting?

A. Yes.

Q. It was just decided and you went up and signed, right?

A. They told us to go up and sign so we could get in the plant to work.

Q. By "they" you are referring to your union officials? A. That is right. [385]

* * * * *

CARL M. KISSICK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Boyd): What is your business address? A. Room 2229 Labor Temple.

Q. What is your employment?

A. I am business representative and financial secretary of Local 3197.

Q. Were you in that capacity in January of 1956? A. I was, sir.

Q. Directing your attention and thoughts to the

(Testimony of Carl M. Kissick.)

date of January 11, 1956, were you at the plant of the Craftmaster operation? A. I was.

Q. About what time?

A. Between 10:30 and 11 o'clock.

Q. Where were you in the plant?

A. On the second floor down on the upholstery and assembly line.

Q. What was going on in that area at that time?

A. Interviewing of applicants, of prospective employees.

Q. Did you then know the interviewer?

A. I did not.

Q. Did you then observe the interviewer? [387]

A. I did.

Q. Who was the person who was then doing the interviewing?

A. I later learned Mr. Sparrowk.

Q. That is the gentleman seated right here (indicating)? A. Correct.

Q. Where were you in relation to the place that he was doing the interviewing?

A. Right outside the door.

Q. Did you overhear his interviewing?

A. Part of it.

Q. How many did you hear his interviewing of?

A. Two or three.

Q. Will you relate what he said to these employees with respect to seeking membership in any labor organization.

A. General routine of asking questions, knowledge, experience, former employment, and a clear-

(Testimony of Carl M. Kissick.)

ance through Local 117, instructions was given them for union affiliation.

Q. You said general inquiry about clearance?

A. No, instructions.

Trial Examiner: What did he say?

Mr. Margolis: I move to strike that entire response. It is not responsive and it is a bare conclusion.

Trial Examiner: I am going to let everything stand except "instructions." I am going to strike what this witness characterized as "instructions."

Q. (By Mr. Boyd): What we want you to do is to tell as you best recall the words or the substance of the words as you heard them given by him to those whom he was interviewing.

A. I won't say word for word, quote. The conversation was for your affiliation go to room so and so, I don't remember the room, on 552 Denny Way, Local 117 of Warehousemen's of the Teamsters.

* * * * * [389]

Q. Now directing your attention to the events of February 10, which was Friday, do you recall receiving information on that date from your membership—let me restate that. I withdraw that question.

What transpired on that date that related to the Englander plant?

Mr. Bassett: What date are you talking about now?

Trial Examiner: Friday, February 10.

A. I had several phone calls in my office and

(Testimony of Carl M. Kissick.)

some personal calls from members of my union stating they were being [391] contacted by representatives of the Teamsters that they should sign up with them.

Q. (By Mr. Boyd): Now, then, passing to the date of February 13, Monday, were you at the plant on Monday, February 13?

A. I was, about 7:15.

Q. Insofar as you were informed what action took place on that morning by the company?

A. You mean outside or inside or what?

Q. No, in the plant. What did Mr. Sparrowk do so far as you know?

Trial Examiner: Excuse me. This is something that you observed yourself, not what somebody told you?

The Witness: Correct.

A. I happened to be on the shipping floor with the crew which was composed of former Craftmaster employees and Mr. Sparrowk came out and informed them that they were going to operate along the same lines or similar that Craftmaster had, and they would need workers to fill those jobs.

Q. (By Mr. Boyd): Did he state at the time when that work was to start? A. No.

Q. He did not then?

A. No, not in my hearing, I will put it that way.

Q. Now, on the following day, February 14, what, if any, action did your union take with respect to your members? [392]

A. Following the session, I will term it, down

(Testimony of Carl M. Kissick.)

at the Craftmaster, Englander Company, I called a meeting of my people, members of Local 3197, for 10 o'clock on the 14th which we met in the Labor Temple.

Q. And at that meeting what did you do?

A. I had the majority of my workers in the meeting, and at that time I instructed them to go to the Teamsters Local 117 and do what was necessary to return to their jobs of work at the plant.

Mr. Boyd: I will pass the witness.

Cross Examination

Q. (By Mr. Margolis): By doing what was necessary you told them to go to the Teamsters and join up?

A. I didn't say join. What was necessary.

Q. What were they supposed to do at the Teamsters hall, Mr. Kissick?

A. Whatever was necessary to procure their employment.

Q. All right, the Teamsters hall was not any branch of The Englander Company, was it?

A. Not to my knowledge.

Q. Why did you send them there?

A. We were under the impression that that was a condition of employment.

Mr. Margolis: Well, I move to strike that, Mr. Examiner, as not being responsive. [393]

Mr. Boyd: That is responsive.

Trial Examiner: I will rule on it. I will deny

(Testimony of Carl M. Kissick.)

the motion. You asked the witness and he told you.

Q. (By Mr. Margolis): You told them to go there with a view of them joining up with the Teamsters?

A. I didn't say join, do what was necessary.

Q. And did your membership go and join up at the Teamsters hall that day, the 14th?

A. I did not go with them, I did not chaperone them.

Q. You know in your own mind, Mr. Kissick, that when they went there they were going to join?

A. I didn't say they went. I instructed them to.

Q. Was the majority of the former Craftmaster employees who were members of your Local on February 14 in attendance at this meeting?

A. I think I stated that.

Q. And they had not joined the Teamsters Union prior to then?

A. I don't know whether any of them had or not. I didn't question them as to individuals.

Q. They were members of your union at the time of the meeting on February 14 and not of 117, isn't that correct?

A. All in good standing.

Q. The answer to my question is yes?

A. Yes. [394]

* * * * *

Q. Do you recall—I believe you said that you did talk to Mr. Sparrowk on the 11th of January, is that correct? A. No, I did not.

(Testimony of Carl M. Kissick.)

Q. You heard him talking to members of your organization? A. I said to people.

Q. Including members of your organization?

A. Some of mine were standing outside the door, I imagine that they had been interviewed.

* * * * *

Q. Just a minute, Mr. Kissick. Will you give the Examiner [395] the benefit of the description of the physical layout. Where were these employees and where were you?

A. I was right outside the door of this little room with the employees themselves.

Q. And they were called in one at a time?

A. I don't say one at a time because they were going out and in. I think he could interview two or three at a time, as far as that goes, right in the doorway.

Q. Could you hear everything that was going on in the room? A. Most everything. [396]

* * * * *

Q. (By Mr. Margolis): The question is did you hear Mr. Sparrowk tell these people that you say were being interviewed that they would make their own decisions as to union affiliation? A. No.

Q. But the honest fact is, Mr. Kissick, is that you did not hear everything that went on in that interview room, isn't that true?

A. Not every word, no. [397]

* * * * *

Q. I stand corrected, February 14, that you told your people to go up to 552 Denny Way, cor-

(Testimony of Carl M. Kissick.)

rect? A. Correct. [398]

Q. You had met with the Teamsters' officials, Mr. Bombadier and Mr. Williams, on February 6, had you not?

A. And with Mr. Truman.

Q. And with Mr. Truman, correct?

A. Right.

Q. And up until that point, at least, isn't it a fact, Mr. Kissick, that this question of jurisdiction was something that was being discussed and negotiated between you two unions?

A. I can't say it was being negotiated. It had been discussed.

* * * * *

Q. Must have misunderstood you. What was the discussion with Mr. Williams?

A. Mr. Williams made the, I would say, reference to that we go down and he and Mr. Truman would survey the factory.

Q. For the purpose of what?

A. Ascertaining who had jurisdiction over certain workers.

Q. The reason you didn't go down there is because you felt you had jurisdiction? [399]

A. Right.

Q. So up until that date, at least, it was a wide open question, wasn't it, Mr. Kissick?

A. As far as deciding it was. [400]

* * * * *

Q. (By Mr. Margolis): Incidentally, Mr. Kissick, was there a vote of your union taken in con-

(Testimony of Carl M. Kissick.)

nection with your statement to them to go up and clear with the Teamsters?

A. It didn't require a vote.

Q. The question is did you take a vote?

A. No.

Q. You just ordered them up there, then?

A. I instructed.

* * * * *

Cross Examination [403]

* * * * *

Q. (By Mr. Bassett): Did you talk to Jeanette Testerman on the 14th day of February?

A. She was in a group of workers in a meeting in the hall.

Q. Did you talk to her personally?

A. That I would hesitate to say because I talked to practically all of my people.

Q. She had been a shop steward, hadn't she, at Craftmaster?

A. She was an elected shop steward by the choice of the workers and Craftmaster.

Q. She had been a shop steward?

A. Right. [406]

* * * * *

Q. (By Mr. Bassett): Mr. Kissick, on how many occasions did you meet with Mr. Williams or with Mr. Bombadier or both of them?

A. I don't say—it was both of them. I will relate to, I think a former witness, that I was among the group consisting of Al Gord, Ralph Royer, Bill Evans, Johnny Truman and myself, who went to

(Testimony of Carl M. Kissick.)

the Teamsters hall at Al Gord's request because he had an appointment with Mr. Williams. After we met with Mr. Williams awhile then we were——

Q. (Interrupting) How many times did you meet with representatives——

A. (Interrupting) Twice.

Q. On what dates?

A. I don't remember the first date. That I don't remember.

Q. The second date was when?

A. February 6. [407]

Q. So the first time was before February 6?

A. Correct.

Q. Did Mr. Gord suggest to you that there was a possibility or probability that the jurisdictional question had been settled between the International Unions? Is that one of the reasons why he asked you to go with him?

A. It is a good long story but I will try to abbreviate it.

* * * * *

Q. (By Mr. Bassett): Was there any talk about a settlement of a jurisdictional question between at least two of the International unions?

A. There was talk of it, yes.

Q. There was talk of it? A. Correct.

Q. And Mr. Gord did mention that to you?

A. There was pending settlement.

Q. Pending settlement? A. Correct.

Q. Did he say it was desirable to go up and talk with Mr. Williams for the purpose of explor-

(Testimony of Carl M. Kissick.)

ing that matter? [408] A. Correct.

* * * * *

Q. But, anyhow, up until February 6 there was some, at least some hope, of reaching a settlement of the jurisdictional dispute that existed between the three unions?

A. Yes, there was efforts on the part of all of us, I will put it that way. [409]

* * * * *

JOHN SPARROWK [411]

resumed the stand, having been previously sworn, and was examined and testified further as follows:

Direct Examination—(Continuing)

Q. (By Mr. Boyd): Preliminarily, Mr. Sparrowk, I hand you a document marked for identification General Counsel's Exhibit No. 13.

* * * * *

Q. (By Mr. Boyd): And ask whether you recognize that and can identify it. A. Yes.

Trial Examiner: The answer is yes?

The Witness: Yes.

Q. (By Mr. Boyd): What do you identify it as being?

A. As a letter from myself to Mr. Nowell.

Q. And this is the same letter to which some reference has been made in your original testimony? A. Yes.

Mr. Boyd: I offer in evidence General Counsel's Exhibit No. 13.

Mr. Bassett: With attachments?

(Testimony of John Sparrowk.)

Mr. Boyd: With the attachments. [412]

* * * * *

Trial Examiner: It will be received together with the attachments.

[See page 371.]

* * * * *

Q. (By Mr. Boyd): Mr. Sparrowk, this document indicates on the face of it that it was signed by you on March 12, 1956? A. Yes, sir.

Q. And it is noted on the back as having been received on March 13, 1956? A. Yes.

Q. It also indicates on the face that you dictated it on [413] March 9, 1956? A. Yes.

Q. And there was transmitted with it the attachments that you find attached thereto, were there not? A. Yes.

Q. Which includes three pages listing the names, classification and hiring dates of the employees of Englander Company at the Seattle plant? A. Yes, sir.

Q. And that was the record prepared as of the date indicated on March 7 of 1956?

A. That is right.

Q. That particular list was prepared by whom, Mr. Sparrowk?

A. By the Seattle office. I don't know the exact person but by the Seattle office.

Q. But pursuant to whose instruction?

A. My instructions.

Q. Your instructions? A. That is right.

Q. That was as a result of which Mr. Nowell

(Testimony of John Sparrowk.)

and myself had made of you? A. Yes.

Q. And had made of you on the preceding Tuesday, which was March 6, was it not, Mr. Sparrowk?

A. I don't know the date but it was prior to that time. You [414] asked for it and I returned to the plant and asked that it be made so I could make it available to you.

Q. They instead of sending it direct to us sent it to you in Oakland and you mailed it to us?

A. Yes.

Q. Along with it you gave this brief summary of certain significant dates as you considered them to be which appears in the letter, the last page thereof?

A. These are dates which Craftmaster supplied to their attorney at the time this was going on. [415]

* * * * *

Trial Examiner: Referring to General Counsel's 2 so there might be no misunderstanding, this is the contract in effect now between The Englander Company and Local 117. I wonder whether you would refresh my recollection as to one or two preliminary matters that I have in mind as to the date as nearly as you recollect it when you signed this agreement?

The Witness: Either the 15th of February or the 17th.

Trial Examiner: And this conversation that you had with the gentlemen in Chicago about this contract, can you refresh my recollection as to the date when that was?

(Testimony of John Sparrowk.)

The Witness: Sometime prior to that time. I would fix it probably a week to ten days prior to that time.

Trial Examiner: Now, before this agreement arrived from your Chicago office, had you ever seen it?

The Witness: That particular agreement, no, sir.

Trial Examiner: Now, between the time that you signed it—or withdraw that.

Between the time that you saw it for the first time, and I take it that it was when you returned to your Oakland office——

The Witness: Yes.

Trial Examiner: (Continuing) ——and the time that you [437] signed it, did you have any communication pertaining to the contract with any representative of the Teamsters Local?

The Witness: No, sir.

Trial Examiner: Specifically did you negotiate this agreement with the Teamsters Local?

The Witness: No, sir.

Trial Examiner: Do you know of your own knowledge who did?

The Witness: No, sir, I don't know of any negotiation.

Trial Examiner: Have you any one individual here in the Seattle office who is in charge of labor relations and negotiation of agreements and collective bargaining or any of them on behalf of the company?

(Testimony of John Sparrowk.)

The Witness: No, sir.

Trial Examiner: Who would be in charge of that?

The Witness: We have a general labor counselor, Mr. Korshak. I have never met the gentleman. I have talked to him on the telephone.

Trial Examiner: Do I understand correctly that you are the top management representative at this plant, the Seattle plant?

The Witness: Yes.

Trial Examiner: That is located on the West Coast?

The Witness: Yes.

Trial Examiner: From your knowledge and practice of the [438] company's customs and procedures and the duties of its personnel would there be any subordinate of yours who would have the authority to negotiate this?

The Witness: No, sir.

* * * * *

Q. (By Mr. Boyd): Do you know when it was that Mr. Dillon or Mr. Williams put their signature on this document? A. No, sir.

Q. GC-2?

A. No, sir, other than to say prior to my signature.

Q. Was Mr. Korshak's name on it before you signed it? A. No, sir.

* * * * *

Cross Examination

Q. (By Mr. Margolis): Exhibit 2, Mr. Spar-

(Testimony of John Sparrowk.)

rowk, is it similar to any other contracts that have been in existence involving Englander plants other than in Seattle? [439]

A. Yes, the other two that I am familiar with.

Q. Is it virtually identical as to form?

A. With the exception of an additional page in Los Angeles, yes, sir.

Q. Pertaining to wage scales and so on?

A. There are no wage scales in this.

Q. There is in this one but not in Los Angeles'?

A. That is right.

Q. You have not negotiated with 117 with regard to wage scales yet?

A. No, sir. [440]

* * * * *

JOHN SPARROWK

a witness called by and on behalf of the Employer, after having been previously sworn, was examined and testified as follows:

Direct Examination

Mr. Margolis: Mr. Examiner, and for the benefit of counsel, I might explain that in the interest of trying to present this situation in the chronological order there might be some repetition, and I just wanted to mention it, Mr. Examiner, and will try to avoid being repetitious as much as possible.

Q. (By Mr. Margolis): Mr. Sparrowk, at the present time what office do you hold with your company?

A. Vice-president of the Western Region.

Q. And that would include the states of what?

(Testimony of John Sparrowk.)

A. Oregon, Washington, California, Arizona, Utah, Nevada, and parts of Montana.

Q. Are you the top company representative, that is, the highest echelon of management on the West Coast for The Englander Company?

A. Yes, sir.

Q. And have you been such since December of '55, January of 1956?

A. Yes, but not with the same title.

Q. Not with the same title. I am getting to that. When did you become vice-president of the Western Region?

A. Early in April. I don't have the exact dates.

Q. April of '56? A. '56, yes, sir.

Q. Between January of '56 and April of '56 what was your title with the company?

A. General manager of the Western Division.

Q. Were your duties substantially the same?

A. Yes.

Q. Now, with respect to the period, say, starting January of 1956, who on behalf of the company had the responsibility for matters involving negotiation of labor contracts, on the West Coast?

A. They were jointly shared between myself and a Mr. Korshak.

Q. Who is Mr. Korshak? [443]

A. General Labor Counsellor.

Q. Back where? A. In Chicago.

Q. And with regard to anyone locally, were you the exclusive representative of the company for labor negotiations? A. Yes.

(Testimony of John Sparrowk.)

Q. And prior to January of 1956 had The Englander Company had any plant of any kind in Seattle?

A. We warehoused. No; we warehoused.

Q. You warehoused? A. Yes.

Q. Would you state whether or not you visited the Seattle area in November and December of 1955 with reference to possible plant location?

A. Yes, sir.

Q. You did. What was the general purpose of your visits?

A. We had arrived at a tentative piece of property with a Mr. Hardman, visited an architect and received some information price-wise with a building contractor.

Q. In view of what?

A. Of starting a manufacturing operation in or around Seattle.

Q. When was the old Craftmaster plant called to your attention, Mr. Sparrowk?

A. In December. [444]

Q. Of '55? A. Yes.

Q. What did you do when the existence of that plant was called to your attention?

A. I came up here in December and made a preliminary inspection of the premises and reported to Mr. Ira Pink, who is president of our company.

Q. Incidentally, your headquarters and residence are in Oakland, California, area?

A. Yes.

Q. Ultimately there were some negotiations that

(Testimony of John Sparrowk.)

led up to some deal involving the Craftmaster plant? Do you understand my question?

A. I am sorry, I don't understand your question.

Q. Did you then commence or thereafter commence negotiations for the possible purchase of the Craftmaster operation?

A. On January 2 I was instructed by telephone to come back up to Seattle where there would be a couple other principals from the company come out to discuss with me whether we thought that it was a feasible thing to do in place of opening one of our own.

Q. Now, on what date was the deal consummated, Mr. Sparrowk? A. January 16.

Q. '56? A. Yes. [445]

Q. All right, now, did you succeed in any way to the operation of the Craftmaster Company?

A. No, sir.

Q. Would you explain to the Examiner just what The Englander Company did with reference to the Seattle plant? What did you acquire?

A. We acquired part of the operating machinery. We leased the premises and negotiated part of the inventory.

Mr. Bassett: I didn't get the last.

A. Negotiated part of the inventory.

Q. (By Mr. Bassett): Negotiated?

A. Yes, we purchased it after we had negotiated price and desirability.

Q. (By Mr. Margolis): And did you assume

(Testimony of John Sparrowk.)

any of the obligations such as accounts payable of the Craftmaster Company? A. No, sir.

Q. The lease was with whom?

A. The Estate of the late Kenneth Schoenfeld, through the Seattle First National Bank.

Q. Did you take over any of the accounts receivable of the Craftmaster Company?

A. No, sir.

Q. Did you assume or take over in any way any contractual matters involving the Craftmaster Company? A. No, sir. [446]

Q. Did you ever enter into any written agreement of any kind with any labor organization at that time? A. No, sir.

Q. Now, Mr. Sparrowk, there was a labor force that was employed by the Craftmaster Company?

A. Yes, sir.

Q. Approximately how many employees did that consist of?

A. I would say that it was told to me that they had around a hundred employees—this was told to me by the then manager for Craftmaster—that some of them were at that time laid off and that they had had periodic layoffs since Thanksgiving.

Q. What were your objectives with reference to that Craftmaster labor force, what were you trying to accomplish?

A. I was attempting—I was trying to create a list for a labor pool, a possible labor pool, of people who had had previous experience in our type of operation.

(Testimony of John Sparrowk.)

Q. And to that end did you talk to any of the Craftmaster employees, prior to the time you acquired the plant? A. Yes.

Q. And at that time those employees were members of various labor organizations?

A. I did not inquire of them, but I assumed that they were because I knew there were other labor organizations represented in Craftmaster.

Q. And did you arrive, prior to January 16, 1956, at any [447] decision as to whether you would employ any of those people in the event you decided to acquire the plant?

A. I discussed the desirability of the list of employees furnished me with the various foremen under whom they were working for Craftmaster.

Q. Was there any decision made with reference to the employment of that labor force that went along union organization lines? A. No, sir.

Q. Were you informed at that time, for example, that some of the people had been and were then members of the Furniture Workers Union?

A. Yes, sir.

Mr. Boyd: Now, Mr. Examiner, from now on—I felt all of this was preliminary—I will urge from now on that counsel not lead the witness. I don't want to be repeating objections.

Mr. Margolis: Very well.

Q. (By Mr. Margolis): And what was your information with reference to the union affiliation of other employees of Craftmaster?

A. That some of them were pro union employees

(Testimony of John Sparrowk.)

and some of them were shop stewards; one in particular was a business agent.

Q. Well, but with reference to union membership, you mentioned the Upholsterers Union. What other unions?

A. The Furniture Workers Union and the Teamsters Union. [448]

Q. And on what basis had you arrived at your decision as to whether you would retain this employee or that one?

A. Purely upon the feeling as to whether our type of operation was something that they could do and whether or not we expected to be in that phase of the business.

Q. Now, during these preliminary meetings or discussions that were had with the employees, do you recall about when it was that the first mention was made of Warehousemen's Union, Local 117, approximately?

A. I would fix the date of January 11.

Q. January 11? A. Yes.

Q. All right, how was that presented to you?

A. I am sorry, I must have misunderstood your question.

Q. How was the question of Local 117 presented to you, was it at the plant?

A. I would have to change the date. I am sorry, it was January 9.

Q. January 9? A. Yes.

Q. All right, sir.

A. It was not at the plant. It was at a hotel in

(Testimony of John Sparrowk.)

Seattle. I was there at the invitation of a Mr. Dillon.

Q. Mr. Dillon? A. Yes. [449]

Q. Who is he?

A. He has an office with the Western Conference of Teamsters.

Q. And, generally, what was discussed there?

A. He introduced me to a Mr. Williams and indicated that inasmuch as they had contracts with us elsewhere and we had been doing business in Seattle and warehousing and it was handled by the Teamsters that they expected to have the representation in whatever undertaking we elected to do here.

Q. At that time did you have contracts involving the other plants with the Teamsters Union?

A. Yes, sir.

Q. The Warehousemen's branch? A. Yes.

Q. And what did you tell them then?

A. I told them that we had not yet acquired a facility here, we were merely looking into it, and we were at that time not even in position to know if we were going to have a plant.

Q. Was there any commitment by you on behalf of Englander Company with reference to recognizing Local 117 at that time? A. No, sir.

Q. There was testimony concerning a meeting at the plant with a group of employees on January 11? A. Yes.

Q. In your own words and as briefly as possible

(Testimony of John Sparrowk.)

would you tell the Examiner just what happened there? [450]

A. Yes, sir. I do not recall the name of the person, someone, a Craftmaster employee, at that time, came into the office and said there were some people assembled who would like to know if they were going to have a job and what we were going to do.

Q. Do you recall what time of day that was?

A. This was in the morning.

Q. At that time were there any pickets out in front of the Craftmaster plant? Do you recall? In the morning.

A. No, sir.

Q. All right, now, would you pick it up from there.

A. I indicated that we were trying to establish some machinery values and so forth, I did not want to disturb the office, we had people there going into that thing, that I would be glad to talk with them someplace out in the factory and asked for a suggested place. It was suggested that I use a little office on the second floor in the Upholstery Department. I went out there, and there was a group of people waiting to talk to me. I took with me a pencil and a piece of paper. That's what I had in my possession. And I asked them to come in one at a time or, if they wished to come in larger groups, to come. They came in one at a time, with the exception of maybe one or two coming together. I explained to them that we were in a position where we were talking to the Craftmaster principals with regard to acquiring some of the facilities here,

(Testimony of John Sparrowk.)

[451] that we would probably be in the business of manufacturing items comparable to what Craftmaster had been making. I also informed them that we were told by the Teamsters Union that inasmuch as they had contracts with us in other plants in the country that they would expect to be recognized in this plant. I indicated to them, told them, rather, that I was not in a position to tell them what they could or could not do from a union standpoint, that they were familiar with the contracts in the unions that they had been members of, and I suggested that they see Mr. Williams of the Teamsters Union and that he would be glad to tell them what they had to offer. I was asked——

Q. (Interrupting) Pardon me a minute. Why did you refer them to Mr. Williams?

A. Because the Teamsters had indicated to me that they expected to have representation of that plant.

Q. Now, up till then had the Teamsters asserted their rights to represent those employees to you?

* * * * *

A. In the fall of '55, after I made a preliminary search for property here and returned to Oakland, Mr. Dillon indicated that he had learned in trying to contact me that I was in Seattle, [452] what was I doing, and I indicated to him that I was looking for a location for a plant. At that time he said to me, "And when you go into that, inasmuch as we cover your other plants, we want you to understand that we will be expecting to have the membership

(Testimony of John Sparrowk.)

there". Again the 9th of January that was repeated.

Q. (By Mr. Margolis): Was that the reason that you referred these inquiries to Mr. Williams?

A. Yes, sir.

Q. All right, now, what else took place, as best you recall, on the 11th?

A. After I had interviewed or talked to a couple of people I was asked where Mr. Williams' office was. I merely said that he was in the Teamsters Building in Seattle, and finally I had to send for a telephone book so I could ascertain because I did not know where the office was.

Q. Now, at any time on that date of January 11 did you inform any of the assembled employees that there was a master agreement in effect that covered this plant, as far as Englander was concerned?

A. I stated that we had agreements elsewhere in the country with the Teamsters. I do not know where the term master agreement come into the picture because I honestly know that we do not have such a thing.

Q. Have you had any written labor agreement of any kind with any labor organization involving the Seattle area other than [453] General Counsel's Exhibit No. 2? A. No, sir.

Q. That is the only one. Now, at that time did The Englander Company have any employees in the Seattle area, other than yourself? I am talking about January 11. A. Yes, sir.

Q. Englander? A. Yes, sir.

(Testimony of John Sparrowk.)

Q. Who would that be?

A. That would be a fellow by the name of Lee Quinn, who was our salesman in the Seattle area.

Q. I see. But with regard to production and maintenance employees you had none?

A. No, sir.

Q. Now, at that time the name of Mr. J. E. Hunt had been mentioned. He was in whose employ at that time? A. Craftmaster.

Q. And the name of a Bill Moore has been mentioned. At that time whose employee was he?

A. Craftmaster.

Q. Did you have any discussions with Mr. Hunt and/or Mr. Moore with reference to union affiliation of possible future Englander employees?

A. Not at that time, no.

Q. Do you recall when the pickets appeared at the plant [454] first?

A. It was either on January 11 when we went out to or returned from lunch. It was about noon-time on January 11.

Q. Around noon on January 11? A. Yes.

Q. Do you recall what union identification was on those pickets?

A. There was no union identification at that time.

Q. Did anything happen that afternoon at the plant when you returned from lunch, do you recall?

A. No, sir.

Q. Now, what was the next meeting with the

(Testimony of John Sparrowk.)

Craftmaster employees that you recall, Mr. Sparrowk?

A. The next meeting that I recall was on a Monday morning of January 16.

Q. And starting from the beginning what took place then?

A. I arrived as usual at the plant around 8 o'clock in the morning. I went into the office, and shortly thereafter several people came in asking about employment. I stated to them rather than talk to individuals I would wait until they were all assembled in one area and then I would be very happy to talk to them.

Q. And did they so assemble? A. Yes, sir.

Q. Now, approximately how many people were there, approximately? [455]

A. I would guess 75 or 80 people.

Q. And were they in the large majority former Craftmaster employees?

A. I did not know because they indicated, stated to me, some of them, "we used to work here, we want to talk to you about a job," but I did not know.

Q. But are they in essence the people whom you subsequently hired? A. Yes.

Q. Who was present other than the workers who subsequently became employed by you? Was Mr. Hunt there? A. No, sir.

Q. Do you know if Mr. Moore was there?

A. I do not know if he was there in its entirety.

(Testimony of John Sparrowk.)

I saw him pass through the room; whether he remained in it I do not know.

Q. What union representatives were there?

A. None, to my knowledge.

Q. Now, what took place?

A. I told the people that we were in the process of negotiating with the Craftmaster people for the premises and that if the negotiations were successful we expected to start a business similar to the one that Craftmaster had. I expressed to them my dismay at the pickets and went so far as to say I don't even know who is picketing the place, and in discussing it with Craftmaster representatives we could not determine [456] whether they were picketing Englander or Craftmaster. But as far as I was concerned in an attempt to discuss with some of the people the possibility that we were going to have an operation I had indicated that the Teamsters expected representation in there. I had suggested to them that they find out the content of what could be offered to them because they already knew it of their other union. If by doing that there was some misunderstanding as to union affiliation I wanted them to know that I definitely was not in a position to tell them what to do. I further stated "I wish I could be helpful but frankly I can't."

Q. Did you tell any of the people assembled on the 16th of January that there was this master agreement?

A. I referred to it and stating that the previous day or two, when I talked to the people on the sec-

(Testimony of John Sparrowk.)

ond floor, that I had indicated that there was a contention on the part of the Teamsters Union that they should have representation in the plant.

Q. Did you tell anyone assembled on that date that they would have to clear through the Teamsters Union if they expected to get employment in your plant? A. No, sir.

Q. Excuse me, up to that time had you acquired anything that belonged to Craftmaster?

A. No, sir. In fact, at that time it didn't look like we would. [457]

Q. Now, in the meantime had you been under any instructions from your headquarters back in Chicago with regard to your obligations, if any, to the Teamsters Union? A. No, sir.

Q. Had you been presented up to that time with any signed or unsigned agreement by the Teamsters Union? A. No, sir.

Q. Following that assemblage you then went where, on the 16th of January?

A. Back into the office; later in the day to meet with the Seattle First National Bank and some people representing the Craftmaster Company and the Estate of the late Kenneth Schoenfeld.

Q. At which time you did what?

A. We signed a lease for the building. We purchased some of the machinery and was able to purchase two pages only of the inventory. [458]

* * * * *

Q. (By Mr. Margolis): Following that, Mr.

(Testimony of John Sparrowk.)

Sparrowk, were there other meetings with former Craftmaster employees?

A. Yes, sir. On two or three other occasions on Monday mornings.

Q. On Monday mornings? A. Yes, sir.

Q. And at some of those were certain union representatives in attendance?

A. I recognized one in attendance on February 13, I believe, which was the last one that was held. Maybe I would like to withdraw that. I thought I recognized him. I was not too familiar with the man. He came in while I was talking and stood in the back, and I thought that I saw Mr. Kissick enter the room.

Q. Now, what was taking place between the 16th of January when you signed the lease and these other papers at the bank and the 13th of February when we had this big assemblage at the plant?

A. We were continuing with the inventory and verification of the inventory. We were cleaning some restrooms, repainting restrooms. We were moving some physical departments around and doing a very small amount of repair work to some furniture that [459] had come in that the customers asked us if we could get back to them because the people wanted it back into their homes.

Q. What time did you arrive at the plant on February 13?

A. Approximately 8 o'clock, as usual.

Q. And what did you see upon your arrival?

A. A substantial amount of people on the out-

(Testimony of John Sparrowk.)

side, also in the entryway, and the vestibule to the office, and in the office proper.

Q. And you proceeded to do what, Mr. Sparrowk?

A. I recognized Mr. Truman and some of the other people as being representatives of the Furniture Workers Union, and Mr. Williams, and I believe Mr. Bombadier, I am not certain. I asked Mr. Truman to come into the office, the private office, and I stated that I would like Mr. Williams to come in there, too, because I wanted both of them to hear what I had to say.

Q. All right, sir, and they did come in?

A. Yes.

Q. All right, and what took place?

A. I stated to them that—or to Mr. Truman, that I was very much distressed to learn that he had had people come down there to report for employment, that I wanted it understood that Englander was doing the hiring, and as long as Englander was paying the bills they would say who should or should not come to work. I also said to Mr. Truman that if he was paying the people that day, and if he wanted to pay them to stand at the [460] machines, but if I was expected to pay the bills I expected to tell who I wanted to come to work or who I did not want to come to work.

Q. Was Mr. Moore or Mr. Hunt there at that time, do you recall?

A. I believe Mr. Hunt was there. It was in his office where the conversation took place.

(Testimony of John Sparrowk.)

* * * * *

Q. Incidentally, Mr. Hunt became employed by Englander Company on what date, do you recall?

A. February 1.

Q. February 1? A. Yes, sir.

Q. Do you recall whether Mr. Hunt stated to anyone in your presence anything about Mr. Williams doing the hiring for the plant?

A. No, sir. If I may add a word, I have ascertained since the—— [461]

* * * * *

The Witness: I substantiated the fact that I was in the room until after the union officials left the room so there could have been no conversation.

Q. (By Mr. Margolis): So you heard everything that went on at that time? A. Yes, sir.

Q. And would you state whether or not Mr. Hunt at any time said that Mr. Williams had the right to do the hiring?

A. No, sir, not during that meeting.

Q. Now, what did Mr. Truman have to say at that time?

A. Mr. Truman stated that they had tried to get along and that he felt that up until that time that it looked like we were going to be able to do business together. I stated to Mr. Truman that I did not feel that way after the action that had happened on a previous Friday night to one of the employees that we had had come to work. [462]

* * * * *

Q. In the meantime had you been in touch with

(Testimony of John Sparrowk.)

your Chicago office with regard to a certain contract? A. Yes, sir.

Q. What were your instructions with regard to that?

Trial Examiner: May we have the time, please?

A. During the week previous to——

Q. (By Mr. Margolis): February 13?

A. Yes, sir.

* * * * *

The Witness: I talked with him daily on the telephone, but [463] I would fix that time perhaps as being around the 6th of February.

* * * * *

Q. (By Mr. Margolis): At that time you received certain instructions from Chicago?

A. That's right.

Q. And to what effect?

A. I was told that there was in the Chicago office a contract that had been signed by Joseph Dillon and W. L. Williams and sent or given to some one in Chicago applying to the Seattle plant. It was the same contract, a copy of one, that was used in Los Angeles.

Trial Examiner: Who told you that?

The Witness: Mr. Chester Pink, the vice-president in charge of manufacturing.

* * * * *

Q. (By Mr. Margolis): Up until the time of that conversation [464] on February 6 had you ever seen a contract involving the Seattle plant?

A. No, sir.

(Testimony of John Sparrowk.)

Q. Up until the time of this meeting in the plant at Seattle on February 13 had you seen such a contract? A. No, sir.

Q. Now, operations resumed on what date or got under way on what date, Mr. Sparrowk?

A. I would say February 14.

* * * * *

Q. On which date you had approximately how many employees, by the close of business February 14, approximately?

A. I should guess maybe 35 or 40 employees. Again, it is definitely guesswork.

Q. Could I refresh your memory with this (indicating)?

A. Please. I would say approximately 50 employees.

Q. Approximately 50?

Trial Examiner: Before we get too far away, if I may come in here for a moment.

You spoke to Mr. Pink and you told us that he said that there was a contract in the Chicago office?

The Witness: Yes.

Trial Examiner: Now, what, if anything else, did he tell you? [465]

The Witness: He told me that he wanted to send the contract on to me and he did not want me to sign that contract or any other contract until I was convinced that whosoever contract I was interested in signing had a majority of the members. He asked me where the contract should be sent and

Testimony of John Sparrowk.)

suggested that he send it to Oakland because I didn't know at the time of that conversation just where I would be.

Trial Examiner: One more point—oh, go ahead, I will reserve this, go ahead, sir.

Does that complete the conversation with Mr. Pink?

The Witness: Yes, sir.

* * * *

Q. (By Mr. Margolis): Mr. Sparrowk, at the time of that conversation with Mr. Pink on February 6, were you under instructions that eventually you would have to sign the Teamster contract?

A. No, sir.

Q. Did you consider yourself free to enter into a labor agreement with any labor organization that had a majority of [466] people in the plant?

A. I would say as free as you can be with pickets on the outside and conversations coming to you from all angles from people who say they represent the members, yes, sir.

Q. We appreciate that entering into a labor contract is not the simplest thing in the world but with regard to the selection of the organization, were you completely free?

A. Yes, sir, I indicated in that very week to Mr. Truman that we had some possible negotiations—

Trial Examiner: Pardon me. Had you ever negotiated any collective bargaining agreements in the Western Division?

The Witness: The Oakland contract was a con-

(Testimony of John Sparrowk.)

tinuation of a contract that had been in existence. I was present at some of the negotiations on the Los Angeles contract, yes, sir.

Trial Examiner: Was there a principal spokesman for the company in connection with those negotiations?

The Witness: Not on the West Coast. Mr. Korshak handled it for us from Chicago.

Trial Examiner: I can't understand something. Now, in this area of collective bargaining with any labor organization pertaining to any of the plants under your supervision, are you subordinate to the judgment or instructions of any other individual connected with The Englander Company?

The Witness: Yes, sir.

Trial Examiner: Who is that? [467]

The Witness: I am subordinate to Mr. Ira Pink, who is president of the company.

Trial Examiner: Who makes the final decision as to whether or not provisions should go into contracts or whether or not a contract should be signed?

The Witness: I would say that the final decision is made by our labor counsellor, Mr. Korshak. I negotiate without his assistance all items pertaining to wages and other factors, but there are some items that are handled by him.

Trial Examiner: Now, on this conversation with Mr. Pink did he in words or substance tell you that subject to your check of the majority that this contract was satisfactory to the company?

(Testimony of John Sparrowk.)

The Witness: No, sir. He did indicate that the contract was on a similar basis as to the one that we had in Los Angeles.

Trial Examiner: Did he in words or substance tell you, subject to your check, if the check turned out that you were convinced of the Teamsters' majority that you should go ahead and sign it?

The Witness: He told me not to sign any contract unless I was convinced of a majority. At that time, Mr. Examiner, we were very much interested in opening a plant, and speaking for my own personal feelings, it didn't make any difference to me who represented the people in the factory. [468]

* * * * *

The Witness: Yes, at a later date I called to their attention that this——

Trial Examiner: To whose attention?

The Witness: To Mr. Korshak's attention that this contract called for a different payment of pension amount than we did elsewhere; one indicated so much a week where the other was so much per hour, and that I understood that in the state of Washington there was a difference in the observance of [469] Washington's birthday and Mr. Korshak told me that he would get into those matters because he felt that it was important that recognition should be given to those facts.

Trial Examiner: Now, had the contract been signed by you yet?

The Witness: Yes, it had.

(Testimony of John Sparrowk.)

Trial Examiner: And how long after the contract was signed did you call this to your counsel's attention?

The Witness: The following week. I returned pretty speedily to Seattle and I didn't have conversation with him until then.

* * * * *

Trial Examiner: What did you do with the contract?

The Witness: I returned it to our Chicago office.

Trial Examiner: When?

The Witness: Either the 15th or 16th, when I signed it.

Trial Examiner: Do you know when Mr. Korshak signed it? Have you any knowledge or information about that?

The Witness: No, sir.

Trial Examiner: By the way, did you read that contract [470] before you signed it?

The Witness: I read only the part that was written in which was different from what we have in existence in Los Angeles. I immediately recognized it as being a similar document to what we have there.

Trial Examiner: If I understand you correctly, you read the handwritten insertions?

The Witness: That is right.

Trial Examiner: And nothing else?

The Witness: That is right.

Trial Examiner: All right, sir.

The Witness: I should say nothing else, I

(Testimony of John Sparrowk.)

started to read it, Mr. Examiner, and when I had read the first two or three paragraphs I accepted it on the advice of Mr. Pink that it was similar to Los Angeles.

Trial Examiner: How far did you get?

The Witness: I would say beyond the first two paragraphs I did not read it except when I were looking for the points that were filled in.

* * * * *

Q. (By Mr. Margolis): Along that line, Mr. Sparrowk, in what respect does the Seattle contract, Exhibit 2, differ from the then existing Los Angeles and Oakland contracts?

A. It has a date affixed in above signatures, which is not in [471] existence in the others. It shows on the last page—it does not show a place for the local employer and the general laborers counsel's place for signature. It does show one space alluded to be where the executive vice-president signs. I do not believe we have an executive vice-president in Seattle.

Q. Well, what I was getting at is this, is there a wage schedule in connection with the plants involved in the other places?

A. There is a wage schedule in Oakland, there is a partial wage schedule in Los Angeles; I am still negotiating some of the other items.

Q. There is no such wage schedule in the Seattle contract?

A. No, sir.

Q. Now, what occurred, Mr. Sparrowk, that led

(Testimony of John Sparrowk.)

you to sign this contract when you returned to Oakland?

A. Late in the afternoon of February 13 Mr. Williams called and told me that he had a majority of the labor pool that we were interested in signed up and requested that I come down to—I told him that I would like to have proof of that, and he requested that I come down to his office and ascertain it for myself. [472]

* * * * *

Q. (By Mr. Margolis): Mr. Sparrowk, inviting your attention to General Counsel's Exhibit 9, which is the photostatic copy of the signatures, would you state whether or not, if you know, the names on that exhibit represent a majority of the people who were actually employed in your plant at the close of business on February 14?

Mr. Boyd: I object. It is immaterial.

Trial Examiner: It is what?

Mr. Boyd: It is not material.

Trial Examiner: Why is it not material? [474]

* * * * *

Mr. Bassett: Mr. Examiner, to save a lot of time——

Trial Examiner: Yes?

Mr. Bassett (continuing): ——I hand you a letter that was mailed to us on May 18 demanding that the applications that we have in our possession be produced here. They are now here and I lay them on the table so that anyone who wants to use them may use them. Mr. Boyd didn't see fit to

(Testimony of John Sparrowk.)

use them. If that will help you, I don't care who uses them. I am getting tired of this. [476]

* * * * *

Q. (By Mr. Margolis): Do you recall the question? A. Yes. The answer is yes.

Q. Now, approximately you indicated by February 14 you had fifty-odd?

A. About 50 employees. [477]

* * * * *

Q. (By Mr. Margolis): When did you return to Oakland following the 14th of February, Mr. Sparrowk? A. Either the 15th or 16th.

Q. And on that date what did you do with reference to this contract, Exhibit 2?

A. I signed it and forwarded it back to Chicago.

Q. Did The Englander Company as of that time observe Exhibit 2 as being binding on it, as of the 15th or 16th of February, that is, with your signature on it?

A. Normally we do not accept a contract as binding until it has all four signatures. Mr. Korshak's was not on it.

Q. With reference to the pension matters in the contract, what was the effective date of that, pension payments? [480]

* * * * *

Mr. Margolis: I am not asking about the contract, I am asking what they actually did with reference to the pension payments provided for in the contract. A. February 15. [481]

* * * * *

(Testimony of John Sparrowk.)

Cross Examination

Q. (By Mr. Bassett): Mr. Sparrowk, when for the first time did you meet Mr. Williams?

A. On January 9.

Q. Where did you meet him and who introduced him to you?

A. Mr. Joe Dillon introduced me to him in Seattle.

Q. I think a given date, I don't remember what date it was, I thought you said February 14, or February 13, Mr. Williams phoned you and told you that he thought a majority of the employees who formerly had been employed by Craftmaster had applied for membership in Local 117? [482]

A. It was late on the 13th.

Q. Late on the 13th? A. Yes, sir.

Q. Did he invite you to examine the applications that had been signed? A. Yes, sir.

Q. Did you examine those applications and compare them with anything?

A. I examined them; I did not compare them with anything.

Q. Did you note the names of these people that were on the applications?

A. Yes, sir, I noted the names and I counted them.

Q. Did you note the dates on the applications?

A. Yes.

Trial Examiner: What do you mean by "note," you made written notations?

The Witness: No, sir. I looked at them and

(Testimony of John Sparrowk.)

ascertained when they were filled out and by whom. And I also noted, if my memory serves me correctly, that there is a place on there showing former employment, and I made particular note of those that indicated that they had been with Craftmaster.

Trial Examiner: By "noted" do I understand you to mean that you observed?

The Witness: Yes, sir, a mental note.

Q. (By Mr. Bassett): Did you do that on the 14th? [483]

* * * * *

Mr. Bassett: He said Mr. Williams called him on the 13th late. I don't know when he actually got around to examining. I am trying to find out when he actually looked at the applications.

Trial Examiner: All right, let's have an answer to that.

A. I still believe it to be late on the 13th.

Q. (By Mr. Bassett): Late on the 13th?

A. Yes. If I may add to that, Mr. Williams called me again the following day and stated that he had more applications and mumbled to me how many that he had. [484]

* * * * *

Trial Examiner: On the record.

For purposes of reference the application blanks, to which reference has been made before, let's regard them, if that is satisfactory, as Respondent's 1 for identification, consisting of 62 separate

(Testimony of John Sparrowk.)

documents, bearing the caption "Application Blanks".

Is that satisfactory?

Mr. Bassett: Respondent Union's 1.

Trial Examiner: Thank you. Respondent Union's 1 for identification. [486]

* * * * *

Q. (By Mr. Bassett): Showing you, Mr. Sparrowk, what has been identified as Respondent Union's 1 for identification, I will ask you to state whether or not late on the evening of February [487] 13 you examined a group of applications, union applications of Local 117 that resemble those that you have before you now. A. Yes, sir.

Q. I will ask you to state whether you examined those for dates and for names of applicants.

A. Yes, sir.

Q. I will ask you to state whether you counted them at that time? A. Yes, sir.

Q. Have you attempted to count them here in this hearing room? A. No, sir.

Q. I will ask you to state whether at that time you counted them and what your count was at that time.

A. It was in excess of 60. I don't have the exact number.

* * * * *

Q. (By Mr. Bassett): After examining the applications composed [488] of this exhibit for identification, Respondent's 1 and counted them, I will ask you to state whether you were convinced that

(Testimony of John Sparrowk.)

Local 117 represented a majority of the production and maintenance employees at your plant or those that you had engaged to report for work.

A. Yes, sir. [489]

* * * * *

Trial Examiner: They will be excluded.

Can you indicate for me about how many of those applications that you looked at on this occasion when Mr. Williams showed them to you indicated that the signatories had worked at Craftmaster?

The Witness: I would say approximately 40, Mr. Examiner.

Trial Examiner: And approximately 40 of those applications showed the name in one form or another of Craftmaster as the former employer, is that right?

The Witness: To the best of my recollection, yes, sir. I am certain that not all of them had worked there. [490]

* * * * *

Trial Examiner: I just want you to tell me how many of those applications show Craftmaster in the blank provided for former employees.

The Witness: All right, sir.

Here is one that says "terminated of closing". Am I again to assume this is Craftmaster or not?

Trial Examiner: Indicating the name Craftmaster?

The Witness: Yes.

(Testimony of John Sparrowk.)

Trial Examiner: There is a blank for former employer?

The Witness: Yes.

Mr. Bassett: Do I understand that the Examiner is ruling out those that say terminated on such and such a date in January as being Craftmaster employees?

Trial Examiner: I am not ruling out anything. I have asked the witness a question. [491]

Mr. Bassett: You have asked him to count how many had the word "Craftmaster" written on it as former employer, is that what I understand, is that correct?

Trial Examiner: I am perfectly willing to have the question I asked the witness read for you, Mr. Bassett.

Mr. Bassett: Well, I don't think the witness understands the question, because he hasn't counted those that do not actually have the word Craftmaster written on them.

The Witness: The answer is 36, Mr. Examiner, if my count is correct. [492]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Boyd): You say that Mr. J. E. Hunt went on your payroll on February 1?

A. Yes.

Q. In what capacity?

A. As factory manager.

Q. Mr. Bill Moore went on your payroll on what date? A. January 23.

(Testimony of John Sparrowk.)

Q. In what capacity?

A. As factory foreman.

Q. Mr. "Red" Henry went on your payroll on what date?

A. On probably the 18th or 19th. I think there is something that would refresh my memory, if the counsel would like to make it available.

Trial Examiner: 18th or 19th of what?

The Witness: Of January.

Q. (By Mr. Boyd): In what capacity? [495]

A. As foreman of the shipping department.

Q. These three men all occupied supervisory positions?

A. Yes, sir. May I ask you to define supervisory for me, please? We have a definition in Englander.

Q. Do they direct other people in the performance of the work, do they have that as a part of their responsibility?

A. They do in addition to several others in the Englander plant, yes, sir. [496]

* * * * *

Trial Examiner: Do you know offhand about how many contracts with the Teamsters Englander has in the area under your supervision?

The Witness: Yes, sir. We have three.

Trial Examiner: You have three?

The Witness: Yes, sir, we have three plants, Los Angeles, Oakland, and Seattle, under my supervision.

Trial Examiner: In your own mind do you re-

(Testimony of John Sparrowk.)

gard them as following a general pattern, a general similar pattern?

The Witness: With the exception of the Oakland which has some considerable difference, but some of the same, yes, sir.

Trial Examiner: I am trying to get out from under a semantic characterization, if we can here, gentlemen.

Go ahead.

Q. (By Mr. Boyd): Do I understand your answer to the Trial Examiner that there are but three agreements with Teamster Unions, there are but three agreements of The Englander Company with Teamster Unions?

Mr. Bassett: In this area he said.

A. With the exception of those in my area I do not know who we have agreements with elsewhere.
* * * * * [497]

Q. (By Mr. Boyd): What is the position of this Mr. Dillon with the Western Conference of Teamsters?

A. I don't know. He is familiar with the Los Angeles contract, he is familiar with Oakland and he entered into this one by the introduction of Mr. Williams and his signature appeared on the contract. I do not know his official capacity.

Q. Did he also sign the Oakland contract?

A. Yes, sir.

Q. Did he also sign the Los Angeles contract?

A. Yes, sir.

(Testimony of John Sparrowk.)

Trial Examiner: When you spoke with Mr. Pink on or about February 6—— [498]

Mr. Boyd: Pardon?

Trial Examiner: When you spoke to Mr. Pink on or about February 6 did he tell you how the contract, General Counsel's 2, came to Chicago, how it came to be there?

The Witness: He received it from Mr. Dillon. I do not know whether he received it by mail or in person.

Trial Examiner: Mr. Pink didn't say?

The Witness: No, sir, he said he received from Mr. Dillon a contract which had been signed by he and Mr. Williams. [499]

* * * * *

Q. (By Mr. Boyd): Are we to understand from your testimony, Mr. Sparrowk, that you were the person with full authority to and did conclude the acquisition of such interests and property as you did acquire on the 16th of January in the transaction at the First National Bank?

A. No, sir.

Q. So the details of that had been negotiated in advance of your going down there?

A. No, sir. Some of which had been done. There were two other principals from Englander present and together we did the job.

Trial Examiner: On that date or previous?

The Witness: We discussed with the Craftmaster attorneys constantly back and forth on the telephone. We consummated the things and made final

(Testimony of John Sparrowk.)

changes at that particular meeting on advice from our attorney in Chicago who was on the telephone actually at that time with us. [500]

* * * * *

Direct Examination

Q. (By Mr. Margolis): The names of J. E. Hunt, "Red" Henry and Bill Moore are those of Englander supervisory employees who formerly were employed by Craftmaster, correct?

A. Yes.

Q. Now, what authority did those men or any of them have from you with reference to matters involving negotiating with labor organizations?

A. None whatsoever.

Q. What authority, if any, did any of them have with you to imposing any union affiliation as a condition of employment with your firm?

A. They had none.

Mr. Margolis: That is all.

Trial Examiner: Which of these individuals, if any, had the right to hire or fire or both?

The Witness: As of what date?

Trial Examiner: I am speaking of the time that they entered your employ, respectively. [501]

The Witness: None of them as of the time they entered our employ.

Trial Examiner: Were any of them vested with authority to making recommendations to you as to hiring or firing?

The Witness: I received recommendations from all of them plus other people.

(Testimony of John Sparrowk.)

Trial Examiner: And what weight did you attach to their recommendations?

The Witness: Considerable prior to the 13th of February, because, frankly, we couldn't get anybody else.

Trial Examiner: Do I understand that you depended on these people prior to February 13? I mean relied upon them.

The Witness: Yes. I instructed one of them, Bill Moore, to call the S.O.S. Employment Agency and see who he could get to come to work, yes, sir.

Trial Examiner: Now, as of the day they were appointed, respectively, to their supervisory jobs in their respective departments, whom did you hold accountable for the efficient operation of those departments?

The Witness: Since I acquired them on different days it changed constantly with the acquisition of other employees. I acquired "Red" Henry prior to acquiring Bill Moore. I acquired Ed Hunt subsequent to Bill Moore, so, again, there were changes. The hiring of factory personnel was vested in myself, and later it was turned over strictly to Bill Moore, [502] with the instructions to the other people that he was to do all hiring.

Trial Examiner: My point is, however, let's take Henry. From the time that you employed him, in his department whom did you hold accountable for the efficient operation of his department? Whom did you look to for that?

The Witness: I looked to him.

(Testimony of John Sparrowk.)

Trial Examiner: And how about Moore?

The Witness: I looked to Moore for four departments.

Trial Examiner: And how about Hunt?

The Witness: I looked to Hunt for nothing except the office at that time. In fact, his detail of still winding up Craftmaster lent him ineffective for quite sometime as far as Englander was concerned.

Trial Examiner: But from the time you hired him did he have any supervisory functions?

The Witness: Yes.

Trial Examiner: Did he have authority to give any employees instructions as to what to do?

The Witness: No, sir, other than the office personnel.

Trial Examiner: I mean those people under him.

The Witness: In the office, yes, sir, not in the factory.

Trial Examiner: And how many were those?

The Witness: Approximately 11 or 12. [503]

* * * * *

Redirect Examination

Q. (By Mr. Margolis): Who ultimately passed on the employees who were being screened or interviewed or seen in the early stages of this, Mr. Sparrowk? A. In the early stages I did.

Q. And was that the purpose of your interviewing these employees, to see their qualifications?

A. Yes, sir.

(Testimony of John Sparrowk.)

Q. Was that the situation up to and including February 14? A. Yes, sir. [504]

* * * * *

Trial Examiner: Going back to this occasion when you gave a number of people the address of the Teamsters and referred them there——

The Witness: Yes.

Trial Examiner: (Continuing) ——that was a date in January, if I recollect correctly?

The Witness: January 11.

Trial Examiner: January 11?

The Witness: Yes. [507]

Trial Examiner: At that time had you had any information or knowledge that any labor organization or organizations other than the Teamsters had represented employees in the Craftmaster plant?

The Witness: Yes, sir.

Trial Examiner: And what organizations were those?

The Witness: Those were the Upholsterers Local No. 5, or Woodworkers, or Furniture Workers—I did not know at that time the local number—and the Teamsters.

Trial Examiner: Did you refer any of those individuals who belonged to either the Furniture Workers Local or Upholsterers Local to the Teamsters?

The Witness: They were all members of one or the other so consequently I did not.

Trial Examiner: I understand now from you that you knew at the time when you made those

(Testimony of John Sparrowk.)

references that those employees were members of some other labor organizations than the Teamsters, is that right?

The Witness: Yes, sir.

Trial Examiner: About how many employees in all did you refer to the Teamsters on that date?

The Witness: I would say between 15 and 18.

Trial Examiner: Why did you refer them to the Teamsters?

The Witness: Because I was advised by representatives of the Teamsters that they expected to have the Seattle operation [508] as they have it elsewhere in the country.

* * * * *

Trial Examiner: You took their word for it?

The Witness: Yes, sir, that they expected to, not that they would, that they expected to.

* * * * *

Trial Examiner: I ask you again, then, why did you refer them to the Teamsters?

The Witness: Because they had indicated in a statement to me that they were going to have them, and I invited the people to ascertain what they had to offer so when the decision was made they would know the entire content of what all three of the unions could offer.

Trial Examiner: Was it your preference at that time that collective bargaining relations be with the Teamsters rather than the other labor organizations?

(Testimony of John Sparrowk.)

The Witness: At that time I had no preference. [509]

* * * * *

Redirect Examination

Q. (By Mr. Margolis): Mr. Sparrowk, referring briefly to Respondent Union's Exhibit 1 for identification, I invite your attention to your testimony yesterday when you stated to the Examiner that at the time you examined those there were in excess of sixty. Now, on what date was that examination made by you?

A. That was late on February 13.

Q. Subsequent to that time did you receive any communication from Mr. Williams concerning whether there were additional applications?

Mr. Boyd: I object. This has been testified to.

* * * * *

A. Yes. [514]

* * * * *

Q. (By Mr. Margolis): What did he communicate to you at that time?

* * * * *

A. Late in the afternoon of February 14 he called me to indicate that he had in excess of twenty more applications which had been signed.

Q. (By Mr. Margolis): Now inviting your attention to General Counsel's Exhibit 9, do you recall when you saw the original of that document?

A. Yes, sir. About 11:00 o'clock on the morning of the 15th.

Q. Fifteenth of February?

(Testimony of John Sparrowk.)

A. Yes, sir. [515]

* * * * *

Q. To the best of your recollection were all the signatures now appearing on General Counsel's Exhibit 9 on the original on the 15th of February?

A. I would say there were two pages at that time.

Q. There were two pages? A. Yes.

Q. Were they fully completed?

A. The first was fully completed. I am reasonably sure the second was fully completed.

* * * * *

Trial Examiner: How did you come to see the original of General Counsel's 9?

The Witness: Mr. Williams called me and told me he had such a paper. I stated to him that I would like to see it. He brought it by the factory prior to my taking a plane for Oakland.

Trial Examiner: This was on the morning of the 15th?

The Witness: Yes, about 11:00 o'clock.

Trial Examiner: Did he tell you in words or substance that these were the additional signatures that he had called you about?

The Witness: He told me this represented the signatures [516] that he had of the people who had made application to that date.

* * * * *

GEORGE MERTEL

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Margolis): Were you formerly an employee of the Craftmaster Company?

A. Yes, I was.

Q. At its Seattle plant? A. Yes, sir.

Q. Approximately how long had you worked for that firm?

A. Oh, around about seventeen years. [517]

Q. And your job there was what, Mr. Mertel?

A. I am a shaperman.

Trial Examiner: S-h-a-p-e-r-m-a-n?

The Witness: That is right.

Q. (By Mr. Margolis): A shaperman has to do with wood working? A. That is right.

Q. You were a member of what union while employed by Craftmaster?

A. Furniture Workers Union.

Q. Local? A. What is it, 10197?

Q. The same Local that all the others belonged to?

A. Furniture Workers. I don't remember. It had too many numbers.

Q. Mr. Mertel, did you participate in any of the picketing at the Craftmaster plant in January and February of this year? A. Yes, I did.

Q. On behalf of what union?

A. The Furniture Workers.

(Testimony of George Mertel.)

Q. And were you at the plant on the morning of February 13, 1956, just prior to that Furniture Workers union meeting? A. Yes.

Q. And up until that time had you made any effort to become a member of the Warehousemen's Union Local 117? [518]

A. No, no, I didn't go anywheres near it.

Q. Did you attend the union meeting that day?

A. Yes.

Q. How did you happen to go there and what caused you to go to the union meeting, who notified you?

A. Well, I was out for about a month, out of work, and I wanted a job, so I went down to the meeting.

Q. Where was the meeting?

A. Down at the Labor Temple, the Furniture Workers.

Q. And about how many people were at that meeting at that time?

A. Oh, I imagine around twelve or thirteen or so.

Q. All members of your union?

A. That is right.

Q. And was Mr. Kissick there?

A. Yes.

Q. Was he presiding at the meeting?

A. That is right.

* * * * *

Q. (By Mr. Margolis): (Interrupting) What was his instruction to you, if any? [519]

(Testimony of George Mertel.)

A. Well, our instructions were to go over and sign up at the Teamsters.

Q. Now, Mr. Kissick told you that?

A. Yes.

Q. All right, following that did you sign up at the Teamsters?

A. Yes, we all went over in a group.

Q. That same day? A. That same day.

Q. Up until that meeting with Mr. Kissick, had you made any decision to join the Teamsters Union? A. No. No, I didn't.

Q. Were you intending to join up until then?

A. No, I had no intentions.

Q. You were present at the plant when all the other employees were there on the morning of the 13th, you stated? A. That is right.

Q. And you heard what went on there?

A. Yes. [520]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Boyd): When was it that you had talked with Mr. Sparrowk?

A. Well, it was around, oh, it must have been around—right after the Furniture Workers, right after the plant shut down. About the 11th, wasn't it?

* * * * *

Q. Under what circumstances was it that you happened to talk with Mr. Sparrowk?

A. I don't just recall but I think he told us to come down and see what was going on. At least I

(Testimony of George Mertel.)

went down, I know, to see whether there was a job there for me or not. I talked to Mr. Sparrowk and he told me that there would be a job for me any time the plant opened up.

Q. Do you recall where it was that you talked with Mr. Sparrowk?

A. Yes, it was on the second floor.

Q. And where on the second floor? [521]

A. Well, in a little office in the upholstering department.

Q. Do you recall fully what it was that passed between you and Mr. Sparrowk during the course of that interview?

A. Well, we sort of joshed back and forth, I remember, and he asked me if I'd like to go to work there and I said yes, and I said I'd be glad to come back on my old job. "Well," he says, "as soon as the plant opens up you come back and go to work."

Q. Did he indicate to you when you should come back to the plant?

A. No, there was no definite date.

Q. He did not suggest that you come back on the following Monday? A. No.

Q. In the course of his talking with you at that time was any mention made of any union agreement? A. No, not that I know of.

Q. Did he in talking with you make reference at all to the Teamsters Union?

A. Not that I know of.

Q. You have no recollection of that?

A. No. No, because I have been there a long

(Testimony of George Mertel.)

time and he took a chance, I just imagine he took a chance on me being back on that job as a shaperman regardless of what was going to happen. [522]

* * * * *

Q. (By Mr. Boyd): The following Monday was on January 16.

A. Yes, I think I was there.

Q. Now, did you hear Mr. Sparrowk when he spoke to the group of employees? A. Yes.

Q. On that occasion did he talk with you personally? A. No.

Q. On that occasion did you hear him make reference to the national agreement with the Teamsters Union?

A. No, he didn't say anything about it.

Q. You have no recollection of it then?

A. No.

Q. When you said a moment ago that it was something he said to a group of employees, to what were you referring?

A. Well, they were firing questions at him.

Q. What question was put and what was his answer, then?

A. Well, some of them were about wages, how the wages were, and the conditions, what the conditions would be, and he replied that they would be about the same as the other factories, [527] might be a half-cent one way or another in wages, and that's about all I could remember what he said there, except they weren't ready to go to work yet and they had a lot of inventory to take and clean-

(Testimony of George Mertel.)

ing up to do, and he advised us when there would be another meeting or we'd be called by telephone or something.

Q. Wasn't one of the questions put to Mr. Sparrowk at that time by some one of the workers there, or former workers of Craftmaster, this question, in substance, well, what is this that we are required to do with reference to joining the Teamsters Union or a question in substance to that effect? Was he asked such a question? A. No.

Q. Was any question asked about union membership, the requirement of union membership?

A. Not that I remember. [528]

* * * * *

Q. Do I understand you correctly that after you had attended the meeting of your Furniture Workers Union you did then go down to the Teamsters Hall and sign up the application, is that correct?

A. That is right.

Q. And at that same time you did sign the original of this document as is shown—this document, General Counsel's Exhibit 9—and I direct your attention to the signature appearing in the left column of names?

A. That's me right there (indicating).

Q. You have identified your signature as being that, the seventh from the bottom in the left column? A. That's right.

Q. Do you remember the date on which you signed this?

(Testimony of George Mertel.)

A. That must have been on the 13th, because I went to work the next day.

Q. You went to work on the next day?

A. Yes.

Q. Didn't you go down there with some other men, Fred Rober, Earnest Herman, Marvin Bale?

A. That's right.

Q. You went down with a group of men? [529]

A. That's right.

* * * * *

Q. You went down to the Teamsters around noontime?

A. Yes, from the Furniture Workers Hall. [530]

* * * * *

Q. Is it your recollection that you went to work on the morning of the 14th?

A. Well, it was around in there somewhere.

Q. Who assigned you to the work that you did on the morning that you went to work?

A. Bill Moore.

Q. What did he tell you to do?

A. He told me to go back to my old job and take over.

Q. This was when you showed up at the plant on the morning that you went to work?

A. Yes.

Q. Did he check with you as to whether you had joined the Teamsters at the time? A. No.

Q. Now, if it is established by other evidence that you actually went to work on Wednesday, the 15th, would it be your [531] present recollection

(Testimony of George Mertel.)

that these things that occurred occurred the day before you went to work?

A. It all occurred the day before. Whichever day I went to work everything happened the day before, that is right.

* * * * *

Redirect Examination

Q. (By Mr. Margolis): Mr. Mertel, at any of these meetings at the plant, did you hear Mr. Sparrowk or Mr. Moore instruct you or any other employees to join the Teamsters Union?

A. No, not that I know of.

Q. Did you hear them say such a thing?

A. No.

Q. Did either Mr. Sparrowk or Mr. Moore tell you that you would not have a job unless you affiliated with the Teamsters [532] Union?

A. No, I didn't hear anything like that. [533]

* * * * *

WILLIAM J. MOORE

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

Direct Examination [537]

* * * * *

Q. (By Mr. Margolis): Mr. Moore, were you ever employed by the Craftmaster Company?

A. Yes, I was.

Q. How long did you work for them?

A. Approximately twenty-four years.

(Testimony of William J. Moore.)

Q. What was your most recent capacity with them?

A. I was the upholstery and mill foreman.

Q. And your employment with Craftmaster terminated when, as you recall?

A. As I recall it was January 20.

Q. This year? A. Yes.

Q. Did you subsequently become employed by another firm? A. Yes.

Q. And what was that firm?

A. Englander Company.

Q. And on what date? A. January 23.

Q. And what was your capacity with Englander at that time, January 23?

A. I had basically the same job, the upholstery foreman and mill foreman. [538]

Q. What is your job with Englander now?

A. I am the general superintendent.

Q. And when did you acquire that title?

A. I think it was May 9.

Q. Would you tell the Examiner when, if ever, you had authority to hire and fire employees of Englander?

A. I had authority from the day the plant opened for production, which I think was February 13, or 14, February 13, I am sure.

Q. Who did the actual hiring up until the plant opened for production?

A. Mr. Sparrowk did all the hiring except there might have been an occasion or two when he was out of town, and then I was there to hire a casual

(Testimony of William J. Moore.)

or two. We were cleaning up and taking inventory and so on.

Q. Who did the screening for employment up until February 14?

A. Mr. Sparrowk mostly when he was there.

Trial Examiner: Upon what authority did you act to hire any people prior to the 13th?

The Witness: Well, through the company, Mr. Sparrowk.

Trial Examiner: He had given you authority?

The Witness: When he was not in town, only.

Q. (By Mr. Margolis): All right, to what extent did you exercise that hire and fire authority, up until the 13th, 14th?

A. In probably one case, as I recall. [539]

Q. And what was the category of that employee?

A. A casual and inventory taker and clean-up man.

Q. And where did you get that employee?

A. As I remember, I think it was from the S.O.S. Employment office, if I remember correctly.

Q. Now, Mr. Moore, you were in and about the Englander plant or the Craftmaster plant from January up to the present time, were you not?

A. Yes.

Q. Did you know the majority of the employees quite well? A. Yes.

Q. Were you on a rather friendly basis with the majority of them?

A. Yes, very friendly.

(Testimony of William J. Moore.)

Q. And still are? A. Yes. [540]

* * * * *

Q. (By Mr. Margolis): Mr. Moore, starting on the 11th of January did Craftmaster or former Craftmaster employees discuss with you the question of the status of the Teamsters Union in the plant?

* * * * *

A. Yes. [541]

* * * * *

Q. (By Mr. Margolis): What was the nature of those questions that were put to you?

A. Of course, they were interested in their jobs and naturally they were asking me about those things and I told them it was my understanding that the Teamsters had approached the company in regard to union membership, and that's as far as I knew because I was still working for Craftmaster at the time.

Q. During the time when you were still on Craftmaster's payroll or when you entered the payroll of the Englander Company, did you tell any employee or prospective employee that he had to become a member of the Teamsters Union as a condition of obtaining employment there?

A. No, sir.

Q. Did you tell any employee or prospective employee that he had to join the Teamsters Union?

A. No, sir.

Q. Did you suggest to any one that they join the Teamsters Union, any employee?

(Testimony of William J. Moore.)

A. No, sir.

Q. Do you recall a man by the name of Robert McDonald who was working in the shipping department of the plant?

A. I do not recall him specifically, no. [542]

* * * * *

Q. (By Mr. Margolis): Mr. Moore, who was your immediate superior at the Englander operation? A. At what time?

Q. At the Englander operation starting when you came on their payroll on the 23rd of January.

A. Mr. Sparrowk.

Q. Now, did Mr. Sparrowk give you any instructions to impose any conditions of union membership with respect to employment of those people?

A. No, he didn't, except he indicated to me that the Teamsters had approached the company in regard to membership and that's about the extent of it.

Q. Did you have any authority from Mr. Sparrowk to enter into any negotiations with any labor organization? A. No, sir.

Q. Did you ever exercise such authority?

A. No, sir. [543]

* * * * *

Q. Now, there has been testimony that you had contacted some of the employees to instruct them to come in to interview Mr. Sparrowk on the 11th of January. I think you contacted them on the night of the 10th?

(Testimony of William J. Moore.)

A. Yes, and a lot of them contacted me and a lot came in that I did not contact. I did it more as a gesture on my part.

Q. Had you not discussed this with Mr. Sparrowk in advance? A. Briefly.

Q. The propriety of your letting these people know that?

A. Yes, because they indicated they were going into the business, there were a lot of people, if I went with Englander, that I would like to have as employees. If they were interested in going to work, I told them that they could interview Mr. Sparrowk.

Q. Do I understand that Mr. Sparrowk told you that you could notify those people that they could come in to see him?

A. He didn't notify me, no, but he suggested that it might be a good idea that some of them come in and talk to him.

Q. Then he did suggest that you contact these people? [549]

A. Probably, but just as many came in that I did not contact.

Trial Examiner: Were those people you recommended to him people you contacted?

The Witness: Not necessarily.

Trial Examiner: Well, were any of the people you recommended to him people that you contacted?

The Witness: Yes.

* * * * *

DANIEL A. WALTERS

a witness called by and on behalf of the Company,
being first [550] duly sworn, was examined and
testified as follows:

Direct Examination * * * * *

Q. (By Mr. Margolis): Were you formerly
employed by the Craftmaster Company?

A. Yes, sir.

Q. And up until about January of this year,
Mr. Walters? A. Yes, sir.

Q. And what was your job with them?

A. I was a band sawyer. I am a band sawyer.

Q. And you belonged to the Furniture Workers
Union? A. Yes, sir.

Q. Mr. Walters, do you recall about the date
that you were separated from your job with Craft-
master? A. January 10.

Q. Were you at the plant on January 11?

A. No.

Q. Do you recall about when you were at the
plant after that?

A. Oh, it was sometime the first of February,
somewhere along there.

Q. Did you have any conversation with Mr.
Sparrowk? [551] A. Not personally, no.

Q. Did you hear him addressing a group of
employees? A. Yes, sir.

Q. In the early part of February?

A. Yes.

Q. Now, Mr. Walters, did Mr. Sparrowk ever
tell you or this group of employees that you or any-

(Testimony of Daniel A. Walters.)

body had to become a member of the Teamsters Union? A. No, sir.

Q. Did he tell you or any of the employees within your hearing that membership in the Teamsters Union was a condition of your getting a job with the Englander Company?

A. Not that I recall at all.

Q. Are you a member of Local 117 at the present time? A. Yes, sir.

Q. And do you recall when you became a member? A. Sometime, I guess, in February.

Q. Around mid-February?

A. I don't know exactly.

Q. Did you go to a meeting of the Furniture Workers Union shortly before you went back to work? A. No.

Q. Who told you to become a member of the Teamsters Union, if anybody?

A. Well, I guess that—they said that we had to be a member [552] of some union when we went to work.

Trial Examiner: Who said that?

The Witness: I wouldn't recall who it was.

Q. (By Mr. Margolis): Was it Mr. Sparrowk?

A. No, I guess it was just general talk.

Q. Just a rumor? A. Yes.

Q. Was that the reason you became a member?

A. I wanted to go to work and I knew I had to join something.

* * * * *

(Testimony of Daniel A. Walters.)

Q. (By Mr. Margolis): Are you acquainted with Bill Moore? A. Yes.

Q. Did he ever tell you that you had to become a member of [553] the Teamsters Union?

A. No.

Q. Did Mr. Hunt ever tell you that?

A. No.

* * * * *

Cross Examination

Q. (By Mr. Bassett): Did you ever attend a meeting at the Teamsters Union?

A. I think I was up there twice.

Q. And did someone address a group up there on behalf of the Teamsters Union Local 117?

A. I think Mr. Williams, if I am not mistaken.

* * * * *

Q. Did they notify you by mail, did you receive an invitation by mail? A. Yes.

Q. Is that why you went there?

A. Yes, sir.

Q. Did Mr. Williams explain to you the Teamsters health and welfare plan? [554]

A. I think they did.

Q. Did he also explain to you the Teamsters pension plan—— A. (Interrupting) Yes.

Q. (Continuing) ——that they hoped to get from Englander? A. Yes. [555]

* * * * *

Cross Examination

Q. (By Mr. Boyd): Do I understand you to say that you had been a member of the Furniture

(Testimony of Daniel A. Walters.)

Workers Union? A. No.

Q. You didn't belong to the Wood Workers?

A. No.

Q. It was the Furniture Workers A.F.L.-C.I.O.? A. Yes.

Q. Tell me this, Mr. Walters, were you a member of the Furniture Workers at the time that you were terminated by Craftmaster? A. Yes, sir.

Q. And did you continue your membership with them up until the time you joined the Teamsters?

A. Yes, sir.

Q. You said you understood that you had to join some organization to have work at the plant, is that not correct? A. Yes.

Q. What decided you, then, if you had to join some organization and you then belonged to the Furniture Workers, what decided you to join the Teamsters?

A. It was understood that the Teamsters would have the union in there. [556]

Q. Who told you this, Mr. Walters?

A. Just talk around, different ones.

Q. Pardon me?

A. Just different ones talking about it.

Q. Well, now, who talked with you about that?

A. Just the men around the plant.

Q. Well, do you ordinarily take instructions from the men in the plant?

A. Not exactly, no, but there is just a general understanding that the Teamsters would have the union in there.

(Testimony of Daniel A. Walters.)

Q. Do you know the source of that understanding?
A. No, I don't.

Q. And was it because of that understanding that you went and applied to the Teamsters?

A. Yes.

Q. Did you sign anything at the Teamsters Hall when you went there?

A. No, not that I recall of signing anything.

Q. I direct your attention to the document before you, which is General Counsel's Exhibit 9 and to the first page thereof, and on the sixth signature thereof, is that your writing?

A. Yes, sir. * * * * * [557]

Q. (By Mr. Bassett): Mr. Walters, I have in my hand an application here that bears your name and I have marked it RU-3, for identification, and I will ask you to state whether that bears your signature and whether all of that is in your handwriting, sir? * * * * *

A. Yes, sir.

Q. (By Mr. Bassett): That is all in your own handwriting?
A. Yes, sir.

Q. Do you notice the date, January 11, is that your handwriting, [559] too?
A. Yes, sir.

Q. Now, do you have a better recollection of when you joined the Teamsters Union, or the Warehousemen's Local 117, does that refresh your recollection that you did make application?

A. This is the application?

Q. Well, it is in your handwriting, you have testified, and your signature.

Testimony of Daniel A. Walters.)

Trial Examiner: Does that refresh your memory as to when you became a member of the Teamsters, does it awaken your memory?

The Witness: Yes, I think it does.

* * * *

Redirect Examination

Q. (By Mr. Margolis): What is your age, Mr. Walters? A. Seventy-four.

Mr. Margolis: No further questions. [560]

Trial Examiner: How did you happen to become a member of the Teamsters on January 11, 1956?

The Witness: I think there was an interview at the plant and they said that we could go up to the Teamsters and make application for membership.

Trial Examiner: Now, who said that to you?

The Witness: Mr. Sparrowk.

Mr. Margolis: I beg pardon?

The Witness: Mr. Sparrowk was interviewing me.

Trial Examiner: Excuse me, please.

Mr. Margolis: I am sorry.

Trial Examiner: You had a talk with Mr. Sparrowk in the plant on January 11, 1956, I take it?

The Witness: Well, if that was the date, and I think it was.

Trial Examiner: Will you now tell me everything that was said between you and Mr. Sparrowk on that date?

The Witness: Well, there wasn't anything said that I know of any more than just how long I had

(Testimony of Daniel A. Walters.)

worked for Craftmaster and my duties as I carried on around the plant.

Trial Examiner: And what was said about the Teamsters? You made some reference to the Teamsters.

The Witness: He just gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union. [561]

Trial Examiner: Had you asked him for the address or what happened?

The Witness: No, I didn't ask him for any address at all.

Trial Examiner: Was he the first one who brought up the address?

The Witness: He just wrote the address on a slip of paper.

* * * * *

Q. (By Mr. Margolis): Mr. Walters, would you relate again just what discussion there was between you and Mr. Sparrowk on January 11—strike that.

Are you sure you were in the plant on January 11 to talk to Mr. Sparrowk?

A. I don't know what the date was but it says there——

Q. (Interrupting) No, I am not talking about this paper (indicating). I say are you sure you were in the plant to talk to Mr. Sparrow on January 11?

(Testimony of Daniel A. Walters.)

A. I am not positive about that but I was up—— [562]

* * * * *

Q. (By Mr. Margolis): Who was present when you talked to Mr. Sparrowk?

A. Just the two of us.

Q. Just the two of you. Would you tell the Examiner according to your best recollection just what Mr. Sparrowk told you on that date?

A. He just asked me the questions of how long I had worked for Craftmaster and what my work was and that was about all, just a question or two.

Q. Did he tell you that you had to join the Teamsters Union?

A. No, he didn't tell me that I had to join anything. * * * * * [564]

ERNEST J. DANTINI

a witness called by and on behalf of the Company, being first [565] duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Margolis): Were you formerly employed by the Craftmaster Company?

A. Yes, sir.

Q. And for about how long?

A. Approximately seven years.

Q. Until when?

A. Until January 10, 1956.

Q. Your job was what?

A. Upholsterer.

(Testimony of Ernest J. Dantini.)

Q. Up until January 10 did you belong to any labor organization?

A. I belonged to the Upholsterers International Union, Local No. 5.

Q. Mr. Dantini, were you in the plant on January 11 of 1956?

A. As I recall we were terminated on a Friday and I returned to the plant the following Monday.

Q. The following Monday. Would that have been January 16? [566]

A. Approximately, yes, sir.

Q. Was that in the morning?

A. That was in the morning.

Q. In your own words, Mr. Dantini, what took place at the plant?

A. We all gathered as a group—I say we all, meaning the upholsterers, wood workers, and mattress workers—at that time we were given a brief talk by Mr. Sparrow in regards to the future of the former Craftmaster plant.

Q. Now, at this juncture, Mr. Dantini, approximately what percentage of the former employees of Craftmaster were there at that time?

A. I would say approximately 90 per cent.

Q. Ninety per cent, and were they all gathered in a group before Mr. Sparrow? A. Yes, sir.

Q. All right, sir, now would you relate just what took place there?

A. Mr. Sparrowk gave us a brief outline of the intentions of the Englander Company, including the

(Testimony of Ernest J. Dantini.)

present conditions, the working conditions, of the U.I.U. contracts as well as the Wood Workers contracts that they would live up to and abide by and if not go beyond and make them better. As far as opening the plant was concerned he didn't know exactly when it would be opening, at the earliest possible date, and he did mention that [567] they were taking inventory and as soon as the inventory was completed, why, the plant would reopen.

Q. All right, sir. Were there any questions raised concerning the status of the Teamsters at that time? A. No, sir.

Q. Was there any mention made with regard to a so-called national or master agreement of the Teamsters? A. No, sir.

Q. Were there any questions raised by any persons present concerning the question of whether a person would have to become affiliated with the Teamsters Union?

A. Not at that meeting, sir.

* * * * *

Q. When did you next appear at the plant?

A. Oh, I believe it was the following Monday. It seemed that all the meetings occurred on Mondays.

Q. I see. And what happened then?

A. At that time the representatives of both the Wood Workers as well as the Upholsterers were, to my knowledge, in session with Mr. Sparrowk in regards to perhaps union activities. I am only speculating on that.

(Testimony of Ernest J. Dantini.)

Trial Examiner: Well, strike the speculation. Let's not have any speculation. [568]

Q. (By Mr. Margolis): By representatives, who do you mean, Mr. Dantini?

A. Well, representing the Upholsterers at that time was Ralph Royer——

Q. (Interrupting) Ralph who?

A. Ralph Royer and Mr. Al Gord, and the Wood Workers, I believe, was Mr. Carl Kissick, and Mr. Sparrowk came out and he gave us the very same picture as was had the previous Monday, in other words, their intentions of opening up the plant at an early date was expected but until such time as inventory was completed that plant could not be reopened, except for probably clean-up work and the general category regarding it. But no mention was made again of any affiliations with unions although some questions at that time were raised by some of the members.

Q. All right, questions were presented to whom?

A. They were presented, they were asked of Mr. Sparrowk.

Q. What did Mr. Sparrowk say?

A. They asked specifically, then, what were the working conditions going to be, what were the wages going to be, and so forth, and he reassured them as he had in the past that the wages would be much the same, if not a little bit higher, working conditions would remain the same.

Q. Was there any question raised as to whether

(Testimony of Ernest J. Dantini.)

there was any contract that was in effect or to be in effect?

A. No, not to the best of my knowledge. [569]

Q. Was any mention made during that meeting as to the status of the Teamsters Union?

A. No, sir. [570]

* * * * *

Q. Incidentally, how did you come to arrive at the plant on these Mondays, who summoned you?

A. We were summoned by the Upholsterers, in my particular case, Ralph Royer, if not Ralph Royer, the picket captain who happens to be Harvey Curry. We were always well informed. [571]

* * * * *

Q. (By Mr. Margolis): All right, again how were you summoned to the plant?

A. We attended a meeting on February 12 which was called by the joint committee or staff, whichever it may be of the Upholsterers International and the Wood Workers, which was held at the Labor Temple on First Avenue South. At that time we were told by Mr. Al Gord that the Upholsterers had a working agreement with the Teamsters and that as far as anything else was concerned, if we wanted to go back to work, why, he suggested that we go up to the Teamsters Hall. Now, that was his own personal edification. At that time, at that meeting, were also present the officers of the Teamsters Union and they gave us a brief talk.

(Testimony of Ernest J. Dantini.)

Q. Oh, the Teamsters representatives were present at this meeting?

A. Were present at the Labor Temple on that morning. [573]

Q. What is Mr. Gord's title?

A. He is the president of Local No. 6, Upholsterers International Union.

Q. No. 6? A. Yes, sir.

Trial Examiner: Your union?

The Witness: No, sir.

Trial Examiner: Another local, all right.

The Witness: The president of Local No. 5 at the time the cessation at the Craftmaster plant came about was under temporary suspension from the Upholsterers International Union out of Philadelphia, Pennsylvania, and it wasn't until after we had gone back to work for the Englander plant that those charges and so forth were clarified and we received the notification of the judgment in the mails from Philadelphia.

Trial Examiner: All right.

Q. (By Mr. Margolis): Now, at this meeting of February 12 was there any vote taken, union meeting? A. Yes, sir.

Q. And what was the effect of that vote?

A. The effect of the vote was that the membership would meet at approximately 2:00 p.m. at the Teamsters Hall located at 552 Dennyway for application to go to work, that is, to go to work for the warehousemen at the Englander plant.

Testimony of Ernest J. Dantini.)

Q. Excuse me, what do you mean by application to go to work? [574]

A. Well, an application to join the union.

Q. To join the union?

A. To eventually become members of the Englander plant.

Trial Examiner: To become employees, you mean?

The Witness: To become employees, I am sorry, r.

Q. (By Mr. Margolis): Approximately what percentage of the former Craftmaster employees were at this union, former Craftmaster upholsterers were at this union meeting on the 12th?

A. I believe between 80 and 90 per cent of the upholsterers were present at that meeting.

Q. All right, then what happened, Mr. Dantini?

A. As I said before, I don't like to be repetitious, but at the Labor Temple many questions and answers were on the minds of the employees, both wood workers and upholsterers, I could see this, and I believe I asked many questions of Mr. Williams specifically in regards to the health, welfare benefits, and so forth of the Warehousemen's Union. He answered them, and I believe that I suggested to the assembly that we go up to the Teamsters Hall and hear the complete story that the Teamsters had. It was at that time or shortly thereafter, I would say, within a half or three-quarters of an hour that we went up to the Hall, and at 2:00 p.m., specifically the meeting was called

(Testimony of Ernest J. Dantini.)

to order by Mr. Williams, in the presence of our former president, Ralph Royer. He was representing the Upholsterers. There was no representation by the Wood Workers. [575]

* * * * *

Q. (By Mr. Margolis): Just briefly, what took place at the Teamsters meeting at 2:00 o'clock?

A. At the Teamsters meeting we were outlined the general health and welfare benefits and we were pointed out how much better these benefits were over our previous health and welfare [576] benefits under the Upholsterers International Union. We were also advised that 500 members of one of the locals—that the Teamsters had transferred 500 members, Upholsterers, members of the Upholsterers in the Los Angeles area, which was a working agreement that the Upholsterers and Teamsters had signed. We were quick to realize, and we all had books and pamphlets and so forth, and they were in black and white, and the benefits were substantially much better than they were in the Upholsterers International. At that time the names of the people that were to be retained by The Englander Company were brought forth. Those members, that is, those names or personnel who wanted to become members of the Teamsters to go to work for The Englander Company were given applications to be considered by Mr. Williams, I presume, and the Warehousemen; then we were to go to work on the following day.

Q. Now, were applications taken at that time?

(Testimony of Ernest J. Dantini.)

A. Yes, sir.

Q. In the meantime had there been pickets from the Upholsterers at the plant, that is, up until about what time?

A. Yes, sir, until such time as the Upholsterers Union was directed by the Upholsterers International Union in Philadelphia that we had a working agreement with the Teamsters and thereby we had to abide by it, and any and all charges that were prepared, unfair labor charges, were to be— [I am searching for a word, I can't find it—were to be— [577]

Q. Until the differences were resolved?

A. Right. [578]

* * * * *

Q. All right. Then the meeting at the Teamsters disbanded following the submission of these applications, is that correct?

A. That is correct.

Q. When did you next appear at the plant?

A. On the 13th.

Q. The 13th of February? A. Yes.

Q. Briefly what took place then?

A. We walked into the plant, our cards were in the rack, we punched our cards, and we immediately were sent to work.

Q. Now, Mr. Dantini, did you ever hear Mr. Sparrowk tell you or any other employees or former employees of Craftmaster that you had to become a member of the Teamsters? A. No, sir.

Q. Did he ever urge, did you ever hear him urge

(Testimony of Ernest J. Dantini.)

you or any other former Craftmaster employees—— A. (Interrupting) No, sir.

Q. (Continuing) ——that they should join the Teamsters Union? A. No, sir.

Q. Did you ever hear such a statement made by Mr. Bill Moore? A. No, sir. [579]

Q. Or Mr. Hunt? A. No, sir.

* * * * *

Cross Examination

Q. (By Mr. Bassett): At that meeting when the health and welfare plan was explained by Mr. Williams did he also explain to you the Teamsters pension plan that they hoped to get in the contract with Englander? A. Yes, sir, he did. [580]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Boyd): With respect to that meeting you say you were addressed by the representatives of Local 5? A. That is right, sir.

Q. The person who was in charge of that meeting was Mr. Gord? A. That is right.

Q. Mr. Gord you say was president of Local 6? A. Yes, sir.

Q. And is it not true that Mr. Gord was the international representative of the Upholsterers in charge of the affairs of Local 5?

A. That is right, sir. [581]

* * * * *

EVERETT H. HARSTAD

a witness called by and on behalf of the Employer,
being first duly sworn, was examined and testified
as follows:

Direct Examination * * * * *

Q. (By Mr. Margolis): Were you employed by
the Craftmaster Company? A. Yes.

Q. And about how long? A. Since 1948.

Q. And until when, Mr. Harstad?

A. February 17, approximately, '56.

Q. February 17, 1956. Are you sure you mean
February 17?

A. I worked a week after the rest of the Craft-
master employees were terminated on account of
repair work.

Q. There has been testimony in this case that
the termination was about January 10. Does that
refresh your recollection?

A. Well, I am probably wrong. I know I worked
a week longer.

Q. A week after the Craftmaster shut down?

A. Yes.

Q. And what was your job?

A. I am an all-around mattress maker. [589]

* * * * *

Q. And what took place when you returned to
the plant on that date?

A. I went in and asked Mr. Sparrowk for a
job. I told him if I didn't go to work pretty soon
I'd have to find something else.

Q. Now, you don't recall the date of that, but

(Testimony of Everett H. Harstad.)

at that time had the plant yet started operation, production? A. No.

Q. How soon before production started was this visit to the plant?

A. Oh, I'd say approximately a week.

Q. About a week before? A. Yes.

Q. And you talked to Mr. Sparrowk personally then? [590] A. Yes, I did.

Q. And would you relate to the Examiner just what the conversation was?

A. Well, I told him I'd have to go to work or find something else, and he said, well, being I was an all-round mattress maker he didn't want to lose me, so he said if you want to come in and do some clean-up work, you know, tearing down walls and so on, I could come in and go to work.

Q. At that time you were a member of what union?

A. I was a member of the Teamsters.

Q. Incidentally what had you been a member of before? A. The Upholsterers, Local 5.

Q. Did you have any discussions with Mr. Sparrowk concerning your union membership?

A. None whatsoever.

Q. Did he ever ask you what union you were a member of? A. No, he didn't.

Q. Did he ever tell you anything with reference to what union you should join? A. No.

Q. Did he tell you that there were any conditions of employment at the plant with regard to union membership?

(Testimony of Everett H. Harstad.)

A. No, nothing of union was talked at all. I just told him I wanted to go to work and he said if I wanted to go in clean-up until they got rolling, why, I could do that. [591]

* * * * *

Q. (By Mr. Margolis): Do you know Bill Moore? Do you? A. Yes, I do.

Q. Did you talk to him at all between January and the time you went back to work?

A. No, I didn't. I work upstairs for Henry Glenn. He is the foreman up there.

Q. Did Henry Glenn ever tell you anything about union membership? A. No.

Q. Are you acquainted with Mr. J. E. Hunt?

A. Yes, I know him.

Q. Did he ever tell you that you had to belong to the Teamsters Union in order to go to work for Englander? A. No, sir.

Q. Did any supervisory employees of Englander ever tell you that? A. No, sir. [592]

Q. Mr. Harstad, would you state to the Examiner whether or not your joining the Teamsters Union was voluntary on your part?

A. Yes, it was.

* * * * *

Cross Examination

Q. (By Mr. Boyd): When did you join the Teamsters Union?

A. I joined about three days before I was terminated from Craftmaster.

Q. Had you been a member of the Upholsterers

(Testimony of Everett H. Harstad.)

up until that time? A. Local 5, yes.

Q. Did you take a withdrawal from the Upholsterers Union? A. No, sir.

Q. Under what circumstances was it that you made application for membership in the Teamsters?

A. Well, through plant gossip among the workers. We heard that Englander was covered by the Teamsters, so I just went down to see what they had to offer, and I liked their health and welfare plan and stuff, and they said that they covered Englander, the Teamsters, Teamster office——

Trial Examiner: Who told you that?

The Witness: Mr. Bombadier; you know, in other states and stuff.

Trial Examiner: Did he say anything about covering this [593] plant in Seattle?

The Witness: No. [594]

* * * * *

Q. (By Mr. Boyd): In view of your examination, Mr. Harstad, of this document now in evidence showing the date of January 19, does that refresh your recollection of the date when you did make application for membership in the Teamsters Union? A. Well, that is it, yes. [604]

Q. And this was, you say, about a week before your work terminated?

A. As far as I can recall. [605]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

AGREEMENT

This Agreement has been entered into this 1st day of October, 1955, by and between The Englander Co., Inc. and the General Teamsters, Chauffeurs and Helpers Union, Local 117.

Article I

Section 1:

The Employer (as used throughout this Agreement to be defined as the Seattle Plant of the Englander Co., Inc.) hereby recognizes the Union (as used throughout this Agreement to be defined as the Warehousemen's, Local 117) as the exclusive bargaining agent for all production and maintenance employees excluding supervisory employees, office employees, clerical employees, watchmen, guards, professional employees and any such other employees excluded from the appropriate bargaining unit under the Labor Management Relations Act as amended.

Section 2:

Employees not covered by this Agreement shall neither be required nor permitted to perform any work customarily performed by the production and maintenance employees covered by this Agreement, except in cases of emergency, training or instruction.

Article II

As a condition of continued employment, all employees employed by the Employer in the unit

General Counsel's Exhibit No. 2—(Continued)
which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment or the effective date of this clause, whichever is the later. The failure of any employee to become a member of the Union at such required times shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union membership was available to such employee on the same terms and conditions generally available to other members, to forthwith discharge such employee. Further, this failure of any employee to maintain his Union membership in good standing as required herein, shall, upon written notice to the Employer to such effect, obligate the Employer to discharge such employee.

No provision of this Article shall apply in any state to the extent that it may be prohibited by state law. If under applicable state law additional requirements must be met before any such provision may become effective such additional requirements shall first be met.

If any provision of this Article is invalid under the law of any state wherein this contract is executed, such provision shall be modified to comply with requirements of State Law or shall be renegotiated for the purpose of adequate replacement. If such negotiations shall not result in mutually satisfactory agreement, either party shall be permitted all legal or economic recourse.

Nothing contained in this section shall be con-

General Counsel's Exhibit No. 2—(Continued)

strued so as to require the Employer to violate any applicable law.

* * * * *

Article XV

Section 1:

The Employer shall pay the sum of \$10.40 each month to the Western Conference of Teamsters Health and Welfare Fund for each employee covered by this Agreement who has been on the payroll 80 hours or more in the preceding month.

Section 2:

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work, however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

Section 3:

Employees who work either temporarily or in cases of emergency under the terms of this Agreement shall not be covered by the provisions of this Article. The Employer's obligation is limited to

General Counsel's Exhibit No. 2—(Continued)
said payments and related reports and the Employer is not obligated in any way to supervise or account for the disposition of these funds.

* * * * *

Article XVII

Section 1:

The Employer shall pay the sum of Four Dollars (\$4.00) each week to the Western Conference of Teamsters Pension Fund for each employee covered by this Agreement who has been on the payroll thirty (30) days or more and works at least three (3) days in said week. This section shall become effective and first payment made on January 1, 1956.

Section 2:

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Section 3:

The Employer and the Union agree that they will engage in a joint study to set forth more specific

General Counsel's Exhibit No. 2—(Continued)
rules on pension eligibility and other conditions.

* * * * *

Article XXIII.

Section 1: This Agreement shall be in full force and effect for a three (3) year period from December 1, 1955 to December 1, 1958, and shall continue in full force and effect from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

Section 2: Either party may, upon giving the proper sixty (60) days written notice to the other, reopen this Agreement for wage items on the following dates:

December 1, 1956,

December 1, 1957.

.....

Employer,

/s/ By JOHN SPARROWK,
Local Representative.

Company,

/s/ By SIDNEY R. KORSHAK,
General Labor Counsel.

/s/ LOCAL 117,

Union,

/s/ By W. L. WILLIAMS,
Local Representative.

WESTERN CONFERENCE
OF TEAMSTERS,

/s/ By JOSEPH M. DILLON.

GENERAL COUNSEL'S EXHIBIT No. 9

WAREHOUSEMEN LOCAL UNION No. 117

552 Denny Way

Seattle, Wash.

We the undersigned former employees of Craftmaster, Inc. do hereby agree to revoke any other Union representation in which I formerly participated as a member and do hereby accept as a new employee of the Englander Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company and do hereby agree to become a member of Warehousemen's Union Local 117 immediately upon going to work for the Englander Company.

(Signed):

| | |
|---------------------|-------------------|
| Frouwe Jonker | Fred Rober |
| Josephine McCloskey | George J. Mertel |
| Lena Walter | George D. Rushton |
| Morton R. Lang | Marvin P. Bale |
| Alex L. Haberkorn | Fred S. Randall |
| Thomas M. Shank | Walter H. Tjaden |
| Harold F. Church | Jesse C. Dennis |
| John F. Lenihan | Adolph Olson |
| Jeanette Testerman | Leo P. O'Hare |
| John J. Woltman | John Posh |
| Viola J. Paris | Emmet R. Morrison |
| Randolph D. | Josephine Griffin |
| Gannaway | Gene A. Curry |
| Edward L. Lenhart | John T. Lenihan |
| Ernest Horman | Fred L. Morris |

General Counsel's Exhibit No. 9—(Continued)

| | |
|---------------------|----------------------|
| John J. Edmonds | John P. Kelly |
| Delbert L. Carlisle | Robert A. Malgren |
| Clara C. Searles | Florence Dantini |
| Alvina Freeman | Martha Auestad |
| Leota E. Hall | Virginia Davis |
| William D. Searles | Charlotte James |
| Howland J. Strub | Helen E. Killebrew |
| Jacob Weingarten | Jean Mankes |
| Sidney Levin | Lucille LaBono |
| Carl North | Effie Marche |
| Inga Slak | Grace B. Miller |
| Frank Falle | Charlotte I. England |
| Leona L. Bowers | Mary T. Ford |
| Louis F. London | Pearl G. Zaworka |
| Willis Chittenden | Zola R. Dahl |
| Donna Simmons | Annie Lyons |
| Ricco Servinzi | Margaret Lakey |
| Harriette McDaniel | Hilda Tjaden |
| Lawrence B. Rush | LaVange Hiber |
| Nesbeth Tucker | Marie Darch |
| D. A. Walters | Florence Bacon |
| Roy Pearson | Ernest J. Dantini |
| Lillian Herman | Domenic Ioffredo |
| Otton Herman | Ralph P. Pillsbury |
| Royal Billadeau | Bert Rothchild |
| Norman E. Gunderson | Inez L. Heminger |
| Jack P. Smith | Belle M. Boone |
| Israel Rosenfeld | Henry T. Rober |
| Antonio Coratolo | William H. Lowe |
| Carl E. Olson | Herbert Balliet |
| Ardis B. Robertson | |

GENERAL COUNSEL'S EXHIBIT No. 10

Warehousemen's Local Union No. 117, Seattle,
Washington.

APPLICATION BLANK

International Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers

Feb. 13, 1956

I hereby make application for membership in the
above Local Union.

Initiation Fee: \$5.25.

Name: Jeanette V. Testuman.

Address: 318 N. 138th St.

Occupation: Woodworker.

Employed at: Englander.

Date of Birth: Jan. 3, 1920.

Phone: Gl 3426.

Date Employed: Feb. 14, 1956.

Are you a citizen of the United States? Yes.

Are you a registered voter? Yes.

Precinct No.....

Social Security No.: 560-24-2326.

Who were your last three employers? Length of
time employed by each one and reason for leaving:
Craftmaster Inc. From March 1952 to 1956.

Are you a member of any labor organization?
.....

If a former member of any labor organization,

General Counsel's Exhibit No. 10—(Continued):

state names of organizations, reasons for leaving organization, withdrawal card, retiring card, dropped out, or expelled:

I hereby agree to pay the regular monthly dues to Local 117 from the date of employment.

All initiation money left on deposit by default of Applicant shall be considered forfeit in 30 days.

/s/ JEANETTE TESTUMAN,

Signature of Applicant.

Beneficiary: Don A. Testuman.

Relationship: Husband.

Address of Beneficiary: 318 N. 138th St.

(Conformed Copy)



James Bale
Bill Williams

Local 117

SSV

17-2-2

Spencer
GC-11



GENERAL COUNSEL'S EXHIBIT No. 13

Conformed Copy

THE ENGLANDER COMPANY, INC.

6425 San Leandro Street

Oakland 21, California

Lockhaven 2-0332

March 12, 1956

(Dictated 3/9/56)

Mr. Gilbert Nowell, Field Examiner
National Labor Relations Board, 19th Region
407 U. S. Courthouse
5th Avenue and Spring
Seattle 4, Washington

Dear Mr. Nowell:

I am enclosing herewith a list of the Englander Company employees in Seattle together with their labor classification and hiring date. Also you will find a sheet containing the various dates which we discussed verbally in your office. If there are any further questions concerning this, please do not hesitate to contact me.

I received in this morning's mail a copy of the letter from Mr. Thomas P. Graham, Jr. indicating that the petition has, with his approval, been withdrawn. However, I understand that the complaint case #19-CA-1307 is still in existence. If there are any developments in this matter, I would appreciate hearing from you.

As originally planned, I will be in Seattle early

General Counsel's Exhibit No. 13—(Continued):
next week and look forward to seeing you at that
time.

Yours very truly,

THE ENGLANDER COM-
PANY, INC.,
/s/ JOHN SPARROWK,
John Sparrowk.

JS/tp
Encl.

Englander
The finest name in sleep

Conformed Copy
Englander Company Employees
March 7, 1956

| Name | Present Classification | Date of Englander Hiring |
|-------------------|---------------------------------|--------------------------------|
| Ernest Paul, | Finisher Helper, | 1/26/56. |
| Albert Stash, | Order Assembler Checker "A", | 1/27/56. |
| Lewis Strom, | Wood Working Mechanic "A", | 2/1/56. |
| Raymond Reedy, | General Maintenance Man "B", | 2/1/56. |
| Sherwell Short, | General Maintenance Man "B", | 2/1/56. |
| William O'Rourke, | General Maintenance Man "B", | 2/1/56. |
| Everett Harstad, | Tape Edge Operator "A", | 2/9/56. |

General Counsel's Exhibit No. 13—(Continued):

Date of
Englander

Name Present Classification Hiring

Ricco Servizi, Wood Working Mechanic "A",
2/10/56.

Opal Tetzlaff, Mattress Department Helper,
2/13/56.

Donna Simons, Divan Department, Miscellaneous, Upholstery, 2/13/56.

Nesbeth Tucker, Component Parts Assembler
"B", 2/13/56.

Daniel Walters, Wood Working Mechanic "A",
2/13/56.

Hans Anderson, Day Fireman, 2/13/56.

Harriette McDaniel, Component Parts Assembler "A", 2/13/56.

Effie Marche, Sewing Machine Operator, 2/14/56.

Delbert Carlisle, Bale Breaker Feeder Operator,
2/14/56.

Thomas Shank, Tape Edge Operator, 2/14/56.

Clara Searles, Filler Helper, 2/14/56.

John Edmonds, R. E. Operator, 2/14/56.

Florence Bacon, Sewing Machine Operator,
2/14/56.

Lucille La Bono, Cutter Mattress, 2/14/56.

Alvina Freeman, Border Cutting, 2/14/56.

Marie Darch, Sewing Machine Operator, 2/14/56.

Ralph Pillsbury, Border Machine Operator,
2/14/56.

Bert Rothchild, Box Spring Maker, 2/14/56.

Katherine Brooks, Sewer, 2/14/56.

General Counsel's Exhibit No. 13—(Continued):

| | Date of Englander Hiring |
|--|--------------------------------|
| Name Present Classification | |
| Lena Walker, Sewer, | 2/14/56. |
| Charlotte James, Sewer, | 2/14/56. |
| Morton Lang, Cutter "B", | 2/14/56. |
| Martha Auestad, Sewer, Lead Woman Cutter "B", | 2/14/56. |
| Josephine McCloskey, Cutter "A", | 2/14/56. |
| LaVange Hiber, Sewer, | 2/14/56. |
| Grace Miller, Sewer, | 2/14/56. |
| Hazel Gehlen, Sewer, | 2/14/56. |
| Frouwe Jonker, Sewer, | 2/14/56. |
| Margaret Lakey, Sewer, | 2/14/56. |
| Virginia Davis, Sewer, | 2/14/56. |
| Belle Boone, Sewer, | 2/14/56. |
| Roy Pearson, Frame Assembler "A", | 2/14/56. |
| Antonio Coratolo, Divan & Chair Maker "A", | 2/14/56. |
| Florence Dantini, Cushion Maker Operator, | 2/14/56. |
| Ernest Dantini, Upholsterer, | 2/14/56. |
| Helen Killebrew, Divan & Chair Maker "A", | 2/14/56. |
| Michele Lembo, Unit Attachment "A", | 2/14/56. |
| Inez Heminger, Divan & Chair Maker "A", | 2/14/56. |
| Harold Church, Frame Assembler "A", | 2/14/56. |
| Mary Ford, Divan & Chair Maker "A", | 2/14/56. |
| Zola Dahl, Divan & Chair Maker "A", | 2/14/56. |

General Counsel's Exhibit No. 13—(Continued):

| Name | Present Classification | Date of Englander Hiring |
|----------------------|-------------------------------|--------------------------|
| Hilda Tjaden, | Divan & Chair Maker | "A", 2/14/56. |
| Charlotte England, | Divan & Chair Maker | "A", 2/14/56. |
| Pearl Zaworka, | Divan & Chair Maker | "A", 2/14/56. |
| Ardid Robertson, | Divan & Chair Maker | "A", 2/14/56. |
| Jean Mankes, | Divan & Chair Maker | "A", 2/14/56. |
| Royal Billadeau, | Divan & Chair Maker | "A", 2/14/56. |
| John Kelly, | Upholsterer, | 2/14/56. |
| Jack Smith, | Upholsterer, | 2/14/56. |
| Carl Olson, | Upholsterer, | 2/14/56. |
| Robert Malgren, | Upholsterer, | 2/14/56. |
| Alexander Haberkorn, | Stock Clerk | "B", 2/14/56. |
| Norman Gunderson, | Assembler Checker | "A", 2/14/56. |
| Otto Herman, | Wood Working Mechanic | "A", 2/14/56. |
| Dominic Ioffredo, | Custom Line Spring Upholster, | 2/14/56. |
| Israel Rosenfeld, | Upholsterer, | 2/14/56. |
| William Searles, | Machine Operator | "A", 2/14/56. |
| Lillian Herman, | Machine Operator | "A", 2/14/56. |
| Leota Hall, | Component Parts Assembler | "A", 2/14/56. |

376 *National Labor Relations Board vs.*

General Counsel's Exhibit No. 13—(Continued):

| | Date of Englander |
|--|----------------------|
| Name Present Classification | Hiring |
| Fred Randall, Wood Working Mechanic "A", | |
| 2/14/56. | |
| Walter Tjaden, Wood Worker, Sample Maker, | |
| 2/14/56. | |
| Jeanette Testerman, Frame Assembler "A", | |
| 2/14/56. | |
| Marion Christy, Truck Driver, 2/14/56. | |
| George Clausen, Truck Driver, 2/14/56. | |
| John Lenihan, Receiving Clerk, 2/14/56. | |
| Fred Rober, Shipping Department Assistant, | |
| 2/14/56. | |
| John Woltman, Janitor and Fireman, 2/14/56. | |
| Raymond Cullen, Garnet Mechanic, 2/15/56. | |
| Gene Curry, Cutter Lead Man, 2/15/56. | |
| Edward Lenhart, Frame Assembler "A", | |
| 2/15/56. | |
| Annie Lyons, Divan & Chair Maker "A", | |
| 2/15/56. | |
| Jacob Weingarten, Unit Attachment "A", | |
| 2/15/56. | |
| Sidney Levin, Upholsterer, 2/15/56. | |
| Fred Morris, Finisher, 2/15/56. | |
| John Posh, Machine Operator "A", 2/15/56. | |
| George Mertel, Shaper Operator "A", 2/15/56. | |
| Adolph Olson, Machine Operator "A", 2/15/56. | |
| Leo O'Hare, Frame Assembler "A", 2/15/56. | |
| Randolph Gannaway, Frame Assembler "A", | |
| 2/15/56. | |

General Counsel's Exhibit No. 13—(Continued):

Date of
Englander

Name Present Classification Hiring

Emmet Morrison, Frame Assembler "A",
2/15/56.

Marvin Bale, Material Handler, 2/15/56.

Jesse Dennis, Component Parts Assembler "A",
2/15/56.

John Lenihan Jr., Material Handler, General,
2/15/56.

Ernest Horman, Packing, 2/15/56.

Howland Strub, Packing, 2/15/56.

Inga Slak, Sewer Mattress, 2/16/56.

Josephine Griffin, Sander Operator, 2/16/56.

Frank Falle, Frame Assembler "A", 2/16/56.

George Rushton, Machine Operator "A", 2/16/56.

Lawrence Rush, Box Spring Apprentice, 2/20/56.

Leona Bowers, Sewer Mattress, 2/20/56.

Willie Chittenden, Upholstery Sewer, 2/20/56.

Leslie Bolster, Upholsterer, 2/20/56.

Louis London, Off Bearer "A", 2/20/56.

Herbert Balliet, Apprentice Cutter Mattress,
2/21/56.

Henry Rober, Packer, 2/21/56.

Donald Berg, Packing, 2/23/56.

Gary Shoop, Order Assembler Checker "A",
2/23/56.

Eva Dver, Cushion Operator "B", 2/24/56.

Rosa Bell Christy, General Helper, Mattress
Sewing Room, 2/27/56.

Viola Paris, Air Stapling Assembler, 2/27/56.

General Counsel's Exhibit No. 13—(Continued):

| | Date of Englander |
|---|----------------------|
| Name Present Classification Hiring | |
| Dorothy Kinnish, Mattress Sewer, | 2/29/56. |
| Thomas Moran, Upholsterer, | 2/29/56. |
| Herman Miller, Frame Assembler, | 2/29/56. |
| Robert Graham, Frame Assembler "B", | 2/29/56. |
| Stuart Stangroom, Janitor, | 2/29/56. |
| David Smith, Spring Up, | 3/5/56. |
| Glenn Floyd, Upholsterer, | 3/5/56. |
| James Johanson, Tape Edge Operator Appren- tice, | 3/7/56. |
| Robert Perry, Tape Edge Operator Apprentice, | 3/7/56. |

Craftmaster - Englander Dates

January 10—Date of last production work by Craftmaster.

Termination notices given by Craftmaster to all Employees as of January 10 except those asked to stay and help take inventory—Firemen—& Truck Drivers.

January 11 A.M.—All inventory crew reported.

January 11 P.M.—Picket Line placed by upholsterers.

January 12 A.M. — Furniture workers pickets joined Uph. pickets. Most of inventory crew refused to pass picket lines and termination notices given these employees as of January 12. Several employees still stayed in jobs.

January 13—Three more employees refused to go

General Counsel's Exhibit No. 13—(Continued):
thru picket lines and were terminated as of the
13th.

January 14 — After special request made of
unions, several employees returned to work to com-
plete inventory and worked the 14th and 15th and
then were given a second termination notice.

Englander took possession of plant on Monday,
January 16, 1956.

Englander hired first employee January 26.

RESPONDENT UNION'S EXHIBIT No. 3

Warehousemen's Local Union No. 117, Seattle,
Washington.

APPLICATION BLANK

International Brotherhood of Teamsters, Chauff-
eurs, Warehousemen and Helpers

I hereby make application for membership in the
above Local Union.

Jan. 11, 1956

Initiation Fee: \$35.00.

Name: Daniel A. Walters.

Address: 12639 Roseburg Ave. So.

Occupation: Woodworker.

Employed at: Englander.

Date of Birth: Mar. 6, 1882.

Respondent Unions' Exhibit No. 3—(Continued):

Phone: Lo 2095.

Date Employed:

Are you a citizen of the United States: Yes.

Are you a registered voter?

Precinct No.:; Social Security No.....

Who were your last three employers? Length of
time employed by each one and reason for leaving:
.....

Are you a member of any labor organization?
.....

If a former member of any labor organization,
state names of organizations, reasons for leaving
organization, withdrawal card, retiring card,
dropped out, or expelled:

I hereby agree to pay the regular monthly dues
to Local 117 from the date of employment.

All Initiation money left on deposit by default
of Applicant shall be considered forfeit in 30 days.

/s/ D. A. WALTERS.

Signature of Applicant.

Beneficiary: Hattie A. Walters; Relationship:
Wife.

Address of Beneficiary: 12639 Roseburg Ave. So.

Conformed Copy

No. 15832

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**THE ENGLANDER COMPANY, INC., AND INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, WAREHOUSE-
MEN'S LOCAL UNION No. 117, AFL-CIO, RESPOND-
ENTS**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

FANNIE M. BOYLS,

Attorney,

National Labor Relations Board.

FILED

MAY 5 1958

PAUL P. O'BRIEN, CLERK

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| | |
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15832

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, WAREHOUSE-
MEN'S LOCAL UNION No. 117, AFL-CIO, RESPOND-
ENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), for enforcement of its order issued against respondents on July 17, 1957, following the usual proceedings under Section 10 of the Act. The Board's decision and

order (R. 9-79, 86-100)¹ are reported at 118 NLRB No. 84. This Court has jurisdiction of the proceedings since the unfair labor practices occurred at Seattle, Washington, within this judicial circuit.²

STATEMENT OF THE CASE

I. The Board's findings

The Board found that the Englander Company, Inc. (here called Englander) violated Section 8 (a) (2) and (1) of the Act by entering into a collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Warehousemen's Local Union No. 117, AFL-CIO (here called Teamsters), at a time when the number of employees at work was not representative of Englander's anticipated work force and by rendering other unlawful assistance to the Teamsters; and violated Section 8 (a) (3) and (1) by discriminatorily denying employment to Robert A. McDonald because of his refusal to join the Teamsters. The Board further found that since the Teamsters were unlawfully assisted, Englander violated Section 8 (a) (3) and (1) and the Teamsters violated Section 8 (b) (2) and (1) (A) of the Act, by agreeing to and

¹ Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

² The Englander Company, Inc., a Delaware corporation with its principal office in Chicago, Illinois, has plants for the manufacture of upholstered furniture and bedding in a number of states, including a plant in Seattle, Washington. Between February and May 1956, Englander shipped more than \$50,000 worth of finished products from its Seattle plant to points outside the State. No jurisdictional issue is presented (R. 12-13; 116, 149-150).

maintaining a union security clause in their contract. The subsidiary facts upon which these findings rest may be summarized as follows:

A. Background: Englander acquires the Craftmaster plant

Englander manufactures upholstered furniture and bedding in a number of states and administers its operations in geographical divisions (R. 12-13; 116, 285-286). The Western Division, comprising the Pacific Coast states, is under the management of Vice-president John Sparrowk (R. 14; 116, 285-286). Prior to 1956 there were two manufacturing plants in the Western Division, one at Los Angeles and the other at Oakland, California, where Sparrowk had his office (R. 14; 116). The production and maintenance employees at both of these plants were covered by bargaining contracts with the Teamsters (R. 14; 125). During the latter part of 1955 Sparrowk made efforts to locate a third factory site for Englander in Seattle, Washington (R. 14; 126-127). Upon returning to Oakland, Sparrowk told Joseph Dillon, a representative of the Western Conference of Teamsters, the purpose of his trip to Seattle (R. 18; 127, 318). Dillon stated: "We expect to have your Seattle operation under contract on the same basis that we have it elsewhere" (R. 18, 89; 127).

In the early part of January 1956, Sparrowk and other Englander representatives began negotiations to lease the plant and purchase some of the inventory and equipment of Craftmaster, Inc., a Seattle firm also engaged in the manufacture of furniture and bedding (R. 15; 116-117, 287-288, 319-320). During the course of the negotiations, Sparrowk, who was inter-

ested in Craftmaster's work force as a "possible labor pool of people who had had previous experience in our type of operation," learned that Craftmaster had slightly more than 100 employees and had collective bargaining agreements with three unions (R. 15-17; 117-118, 155, 289, 323). About 71 of the Craftmaster employees were members of an Upholsterers union,³ some 35 were members of a Carpenters union affiliated with the Washington-Oregon District Council of Furniture Workers,⁴ and a few truck drivers were members of the Teamsters (R. 16; 155-157, 178, 192, 197-198). On January 9 Sparrowk met Teamsters Representative Dillon in a Seattle hotel at the latter's request (R. 18; 128, 291-292). Dillon introduced Sparrowk to W. L. Williams, a representative of the Teamsters' Seattle Local 117, and again stated that the Teamsters "expected to have the representation in whatever undertaking [Englander] elected to do here" (R. 18-19, 89; 292, 128, 312). Craftmaster terminated the employment of all but a few of its employees on the following day and Englander took possession of the plant on January 16 (R. 15; 116, 119, 212, 220, 243, 255, 260-261, 288, 378). Although Englander did not assume any contractual obligations of Craftmaster, it subsequently hired a substantial number of Craftmaster's employees and supervisors under circumstances set forth in detail below (R. 17; 117, 288-289).

³ Local 5 of Upholsterers International Union of North America, AFL-CIO (R. 13, 16).

⁴ Local 3197, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (R. 13, 16).

B. The unfair labor practices

Vice-president Sparrowk was in Seattle for about a week prior to the execution of the lease and spent some time at the plant in connection with an inventory Craftmaster was taking (R. 19; 118-119, 130). On January 11 Sparrowk interviewed between 15 and 20 former Craftmaster employees who had come to the plant seeking employment with Englander (R. 19; 119-120, 121-122). After stating that he hoped to open the plant on January 16, Sparrowk told the applicants that Englander had been advised by the Teamsters that it "would expect to be recognized in this plant" (R. 19-21, 43; 294, 124). Sparrowk also referred the applicants to Teamsters Representative Williams for the purpose of discussing membership in the Teamsters and furnished some of them with the Teamsters' address (R. 19-22, 87; 124, 129, 294-295, 213-215, 245-246, 271-272, 322-323, 345-346, 370). According to applicant Daniel Walters, a witness for Englander, Sparrowk "gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 44; 345-346). Walters testified further that he had not asked Sparrowk for the Teamsters' address, that Sparrowk "just wrote the address on a slip of paper" (R. 44-45; 346). Walters, who was 74 and a member of the Furniture Workers union, applied for membership in the Teamsters on the same day (R. 45, 49; 344-345, 379). Other applicants construed Sparrowk's unsolicited proposal that they go to the Teamsters to discuss membership as meaning that clearance by, or

membership in, the Teamsters was to be a condition of employment at the plant (R. 45, n. 12, 48-49; 214-215, 245-246).⁵

Within the next two days the Upholsterers and Furniture Workers unions began picketing the plant (R. 16-17; 183, 198-199, 282, 378). On January 16, the day Englander signed the lease, Sparrowk told some 80 former Craftmaster employees about the Teamsters expectation that "they would have this plant" (R. 41-42; 33). Noting further that the picketing evidenced some disagreement with this, Sparrowk stated that he would like to start operating and give them work but could not while there was a union problem (R. 133-134).

⁵ Three applicants testified that Sparrowk stated they would have to join or "clear through the Teamsters" as a condition of employment (R. 19-21; 214, 221, 245). Sparrowk admitted referring applicants to the Teamsters and furnishing them with the Teamsters' address, but denied making such a statement, claiming that he said he "was not in a position to tell them what they could or could not do from a union standpoint" (R. 39, 43-44; 294). Noting that Sparrowk was not a forthright witness, the Trial Examiner placed no credence in Sparrowk's asserted motive for referring applicants to Teamsters and found that he made no expression of neutrality to those applicants who testified at the hearing (R. 36-39, 43-45). The Trial Examiner further observed that in view of the "setting in which the interviews occurred, and the fact that the referrals were unsolicited and made upon his initiative," the applicants would naturally "interpret his statements as meaning that clearance by, or membership in, the Teamsters Local was to be a condition of employment at the plant" (R. 39-40, 48-49). However, the Trial Examiner found no substantial evidence that Sparrowk expressly voiced such a condition (R. 39-40).

On January 26 a representative of the Furniture Workers, John Truman, told Sparrowk that the Furniture Workers still represented the applicants formerly employed by Craftmaster and inquired whether Englander had taken over Craftmaster's contract with the Furniture Workers (R. 22, 89; 151-152). Sparrowk replied no, that "nation-wide" Englander "was under agreement to the Teamsters through a master agreement" and he was "bound by the master agreement" (R. 22-23, 89; 153-154). Sparrowk added that Englander had "good working relations" in the "plants covered by the Teamsters' agreements" and that he did not "want to jeopardize them by signing this plant to another organization" because Englander "would be subject to reprisals by Teamsters in other locations" (R. 23, 89; 154). On February 3 Sparrowk turned down Truman's further request for a consent representation election to be conducted by the Board, because he was "under an agreement with the Teamsters" (R. 23, 89-90; 154-155, 157).

On February 6 the Englander home office in Chicago telephoned Sparrowk that it was forwarding a contract signed by the Teamsters for the Seattle plant (R. 34-35, 89; 142, 303, 319). This contract which Sparrowk signed, without reading in full, on February 15, was little more than a duplicate of the one covering Englander's Los Angeles plant, even to the extent of bearing execution date, October 1, 1955, and effective date, December 1, 1955—dates prior to the acquisition of the Seattle plant (R. 33, 36, 90; 136-141, 308, 361-365). The contract also contained a union

security clause making membership in the Teamsters on the 31st day of employment a condition of continued employment (R. 34, 88; 361-362).⁶ Sparrowk did not negotiate contract terms with the Teamsters and the record contains no evidence of any contract negotiations between the Teamsters and any other Englander official (R. 60, 90; 282-283).

Between January 18 and February 1 Sparrowk hired three former Craftmaster supervisors, employing J. E. Hunt as factory manager, William Moore as factory foreman, and "Red" Henry as shipping department foreman (R. 17; 130-132, 302, 316-317, 320). As of February 1 Sparrowk had only eight nonsupervisory employees and had not yet begun production on any substantial scale (R. 25; 149, 280-281, 371-378). On February 10 a Teamsters representative telephoned former Craftmaster employee Testerman at her home to ask if she wished to go to work at the Englander plant on the following Monday, February 13 (R. 25;

⁶ Article II of the contract read (R. 361-362):

As a condition of continued employment, all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment or the effective date of this clause, whichever is later. The failure of any employee to become a member of the Union at such required times shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union membership was available to such employee on the same terms and conditions generally available to other members, to forthwith discharge such employee. Further, this failure of any employee to maintain his union membership in good standing as required herein, shall, upon written notice to the Employer to such effect, obligate the Employer to discharge such employee.

220-221, 225-227). When Testerman inquired if the labor dispute was settled, the Teamster representative replied that the Teamsters "had a contract" at the plant and that the picket line of the Upholsterers and Furniture Workers "wasn't legal" (R. 25; 227). Testerman reported this conversation to representatives of her union, the Furniture Workers (R. 25; 227-228, 186). Upon receiving similar reports from other former Craftmaster employees, the Furniture Workers notified its membership to be at the plant on February 13 (R. 25-26; 162, 186-187).

Early on the morning of the 13th about 60 former Craftmaster employees came to the plant in search of employment. Approximately half were members of the Furniture Workers and the others of the Upholsterers. Representatives of both unions were present and also Teamster Representative Williams. When the plant doors opened, the job seekers and union representatives entered, with Truman of the Furniture Workers leading the members of his union (R. 25-26; 163-165). Sparrowk summoned Truman and Williams to Factory Manager Hunt's office and rebuked Truman for bringing jobseekers into the plant (R. 26; 165, 172, 176, 184-185, 300-301). At this point William Evans, another Furniture Workers representative who had overheard the "loud talking," entered the office to tell Sparrowk and Hunt that "there was a misunderstanding because, if anybody was responsible for the members of Local 3197 [the Furniture Workers] being down there to go to work that morning, it was the Teamsters, and specifically Mr. Wil-

liams and others of his staff whom I don't know" (R. 26; 185, 187). Evans also expressed the view that "apparently Mr. Williams is acting as your personnel manager" (R. 26, 89; 166, 187). Factory Manager Hunt replied that Williams "had the right to call these people inasmuch as the Teamsters held an agreement with the Englander Company" (R. 26, 89; 166, 188-189).

After Sparrowk told the applicants that the plant was ready to open for production, a large number of them went to the Teamsters' office later that day and the next and applied for membership (R. 28-30; 229-234, 247-248, 265-266, 329, 352-355).⁷ At the Teamsters' request, they also signed a document which provided that (R. 30, 55, 90; 229-234, 248, 265-267, 332-333, 366-369):

We the undersigned former employees of Craftmaster, Inc., do hereby agree to revoke any other Union representation in which I formerly participated as a member and do hereby accept as a new employee of the Englander

⁷ Shortly after Hunt's statement that the Teamsters had an agreement with Englander, both the Furniture Workers and the Upholsterers held meetings of their members who had been in Craftmaster's employ (R. 28-29; 167-169, 202). The Furniture Workers advised its members, who had been out of work for over a month, to join the Teamsters if that was necessary to go back to work (R. 29; 174-175, 191-192). The Upholsterers reported to its members that their status had been settled by a "deal" between the parent body of the Upholsterers and Teamsters (R. 28-29; 204-205). Teamster Representative Williams addressed the Upholsterers' meeting and spoke about the Teamsters' pension and insurance programs (R. 28-29; 204). Both the Furniture Workers and the Upholsterers also withdrew their picket lines at the plant (R. 17, 29; 132, 168, 191).

Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company and do hereby agree to become a member of Warehousemen's Union Local 117 immediately upon going to work for the Englander Company.

Englander hired six employees on the 13th and began production on February 14, hiring 60 employees on that date, an additional 18 on February 15, and 4 more on the following day, bringing its nonsupervisory payroll to 96 employees as of February 16 (R. 28, 30; 372-378, 149, 280-281).

One of those hired on February 16 was Josephine Griffin, a member of the Furniture Workers who had not been employed by Craftmaster (R. 31; 250, 254, 377). Griffin had previously applied for employment to Factory Foreman Moore on February 14 (R. 31, 87-88; 250-252). Moore told her a job was available, "but first you have to get it straightened out with the Teamsters". When Griffin asked Moore whether she would be employed "if I join the Teamsters", Moore replied in the affirmative (R. 31, 87-88; 252). Griffin signed an application for membership at the Teamsters' office the same day and thereafter entered Englander's employ (R. 31-32; 253-254).

On February 20 Robert A. McDonald, a former Craftmaster employee, applied to Foreman Henry for employment (R. 32; 255-257). Henry said he had no job, but telephoned McDonald on the following evening that a job was available and McDonald

“would have to clear through the Teamsters” (R. 32, 88; 256-257). Replying that he “would like to think it over”, McDonald made an appointment with Henry for February 23 (R. 32; 257). McDonald came to the plant on that date, but spoke to Factory Foreman Moore instead of Henry (R. 32; 257-258). After explaining the duties of his job Moore told McDonald that he “would have to join the Teamsters.” McDonald refused, stating: “Why join the Teamsters when the Carpenters & Joiners have the furniture plants”. Although Moore asked why he should be “the only one not to join the Teamsters when everybody else has,” McDonald repeated his refusal. Moore then said, “Well, I guess we can’t do any business” (R. 32, 88; 258). McDonald did not enter Englander’s employ (R. 32; 258-259, 372-378).

II. The Board’s conclusions and order

Upon the foregoing facts and the entire record, the Board concluded that Englander had violated Section 8 (a) (2) and (1) of the Act by referring job applicants to the Teamsters under the circumstances of this case, by entering into a contract with the Teamsters prior to the time a representative number of employees had been hired, and by the statements of foremen Moore and Henry to employees Griffin and McDonald. The Board also concluded that because the Teamsters was an assisted union, the union security clause in respondents’ contract was violative of Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act. And, finally, the Board concluded that Englander had discriminatorily

denied employment to McDonald in violation of Section 8 (a) (3) and (1) of the Act.

The Board ordered respondents to cease and desist from the unfair labor practices found and from in any other manner infringing upon employees' exercise of their rights under Section 7 of the Act. The cease and desist provisions of the Board's order also enjoin Englander from recognizing the Teamsters, and both respondents from giving effect to their contract, unless and until the Teamsters shall have been certified as the representative of Englander's employees. Affirmatively, the Board's order requires Englander to offer McDonald employment with back pay, to withdraw and withhold recognition from the Teamsters unless and until certified, and requires both respondents to post an appropriate notice (R. 91-100).

ARGUMENT

I. Substantial evidence supports the Board's finding that Englander violated Section 8 (a) (2) and (1) of the Act by supporting the Teamsters and violated Section 8 (a) (3) and (1) by denying employment to applicant McDonald because of his refusal to join the Teamsters

The Board's finding that Englander assisted and supported the Teamsters, is fully warranted by the record. As described *supra*, pp. 5-6, on January 11 Vice-President Sparrowk told job applicants that the Teamsters expected to be recognized in the plant. Although aware that the job seekers were members of the Upholsterers and Furniture Workers unions, Sparrowk referred them to the Teamsters to discuss membership in that organization and furnished them with the Teamsters' address. The impact of this

conduct upon the applicants is shown by the fact that several of them construed Sparrowk's unsolicited proposal that they discuss membership in the Teamsters as meaning that clearance by, or membership in, the Teamsters was to be a condition of employment at the plant. Indeed, applicant Walters lost no time in joining the Teamsters immediately after Sparrowk gave him "the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 45, 50 n. 15; 346, 379).

The Board found that Sparrowk did not expressly condition employment upon membership in, or clearance by, the Teamsters. However, in view of Sparrowk's fear that Englander "would be subject to reprisals by the Teamsters in other locations" if the Teamsters did not have their way at the Seattle plant, the Board concluded that his purpose in referring applicants to the Teamsters was to "provide that organization with an opportunity to wean the job applicants away from other unions, in a climate of implied approval by Englander" (R. 38, 49). The circumstance that such intimidation was subtle rather than direct does not excuse Sparrowk's unsolicited intrusion upon the employees' right to free self-organization. "Intimations of an employer's preference, though subtle, may be as potent as outright threats" (*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 599-600). These individuals had just been discharged by Craftmaster and were dependent upon Sparrowk's approval for an opportunity to resume employment at the plant. In this setting, we submit, the Board prop-

erly concluded that the referral of applicants to the Teamsters was for the purpose of encouraging them to join the Teamsters and was an unlawful act of assistance in violation of Section 8 (a) (2) of the Act. As this Court has observed (*N. L. R. B. v. L. Ronney & Sons*, 206 F. 2d 730, 734-735): "Under that section an employer must refrain from all interference with union activities. He must maintain a strictly neutral attitude. *Harrison Sheet Steel Co. v. N. L. R. B.*, 7 Cir., 194 F. 2d 407. An employer does not observe such neutrality where, as here, he takes it upon himself to inaugurate a membership drive among his employees by the union of his preference."

Furthermore, other representatives of management openly coerced applicants into joining the Teamsters. Thus, Foreman Moore told applicant Griffin on February 14 that she would "first have to get it straightened out with the Teamsters" as a condition of employment and would have a job if she joined the Teamsters (R. 31, 87-88; 251-252). Similarly, on February 21 Foreman Henry told applicant McDonald that he would have to clear through the Teamsters as a precondition to receiving a job (R. 32, 88; 256-257). Foreman Moore also told McDonald he would have to join the Teamsters if he wanted a job with Englander, and upon McDonald's refusal stated, "Well, I guess we can't do any business" (R. 32, 88; 258). This actual or threatened discrimination in employment to aid the Teamsters not only suffices in itself to sustain the Board's finding of unlawful support, but establishes also that the denial of employment to McDonald was because of his refusal to join

the Teamsters and hence was violative of Section 8 (a) (3) and (1) of the Act.⁸ *Mastro Plastics Corp. v. N. L. R. B.*, 350 U. S. 270, 273, 278; *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 40-42; *N. L. R. B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B. v. L. Ronney & Sons, supra*, 206 F. 2d at 735; *Harrison Sheet Steel Co. v. N. L. R. B., supra*, 194 F. 2d at 410.

Before the Board Englander sought to avoid responsibility for the statements of Factory Foreman Moore, Shipping Department Foreman Henry, and Factory Manager Hunt, by asserting that these individuals had no authority to bind the Company. However, the record shows that all three had authority responsibly to direct the work of employees at the Seattle plant and exercised such authority (R. 18;

⁸ The Board properly rejected Englander's contention that it was prejudiced by the Trial Examiner's ruling permitting the General Counsel to amend the complaint to include an allegation as to the discriminatory refusal to employ McDonald. Section 10 (b) of the Act provides that a "complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." Although the Trial Examiner gave Englander an opportunity to apply for additional time to prepare its case against the McDonald allegation (R. 87, n. 2; 113-114), Englander failed to do so. Moreover, all of the issues were fully litigated at the hearing. Hence, Englander's "argument must fail because, all else aside, 'there was no showing of surprise which may have hampered presentation of respondent's defense on this aspect of the case.'" *N. L. R. B. v. Dinion Coil Co.*, 201 F. 2d 484, 491 (C. A. 3). Accord: *N. L. R. B. v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 349-350.

130, 131-132, 263, 316-317, 320-322). In addition, Foreman Moore had authority to hire and fire on and after February 14 when his statements to Griffin and McDonald were made (R. 336, 131-132, 321). Hence, they were all clearly supervisors within the meaning of Section 2 (11) of the Act, as the Board found (B. A. 18), and their conduct is attributable to Englander. *I. A. M. v. N. L. R. B.*, 311 U. S. 72, 80; *N. L. R. B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C. A. 9); *N. L. R. B. v. Geigy Company*, 211 F. 2d 553, 557 (C. A. 9), certiorari denied 348 U. S. 821, and cases there cited.⁹

Englander also contended that Foreman Moore's statements to Griffin and McDonald, to the effect that these applicants would have to join the Teamsters as a condition of employment, were permissible under the union-security clause of its contract with the Teamsters because Moore did not specify when they would have to join that organization. But, as we show *infra*, pp. 24-25, the union-security clause with an assisted union was itself unlawful and therefore unavailable as a defense to threatened or actual discrimination in employment.

In addition to encouraging applicants to join the Teamsters, Englander also assisted that union by making an agreement with it before a representative

⁹ Moreover, Section 2 (13) of the Act specifically provides that in "determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

number of employees had been hired. The Board's finding that Englander and the Teamsters had an agreement prior to February 14, 1956, has a reasonable basis in the record. During the fall of 1955 and again on January 9, 1956, Teamster Representative Dillon informed Sparrowk that the Teamsters expected to have Englander's Seattle operation under contract on the same basis as it had other Englander plants (R. 18, 89; 127, 292). This expectation met with no opposition from Sparrowk, since he did not want to "jeopardize * * * good working relations" with the Teamsters at the Los Angeles and Oakland plants and feared that Englander "would be subject to reprisals by Teamsters in other locations" if he signed a contract for the Seattle plant with another union (R. 23, 89; 154). Thus, even before the lease was executed on January 16, the question of representation at the Seattle plant had been predetermined by the established relationship between Englander and the Teamsters elsewhere.

Following the execution of the lease, but prior to February 14—when a substantial number of employees was hired and production commenced—both Englander and the Teamsters made frequent references to an agreement between them covering the Seattle plant. While discussing representation at the Seattle plant with Furniture Workers' Representative Truman on January 26, Sparrowk stated that nationwide Englander was "under agreement to the Teamsters through a master agreement" and that he was "bound by the master agreement" (R. 23, 89;

153-154).¹⁰ On February 3 Sparrowk refused to consent to a representation election at the Seattle plant on the ground that he was "under an agreement with the Teamsters" (R. 23, 89-90; 157). On February 13 when the Furniture Workers protested that Teamster Representative "Williams is acting as your personnel manager," Factory Manager Hunt replied that Williams had a right to ask job applicants to come to the plant because the "Teamsters held an agreement with The Englander Company" (R. 26, 89; 166, 187, 189). Similarly, on February 10 the Teamsters telephoned applicant Testerman to ask if she wished to go to work and told her that they "had a contract" at the plant (R. 25, 90; 223, 227).¹¹ And, finally, as early as February 13, the Teamsters asked Englander job applicants to sign a document which recited that

¹⁰ There is, and could reasonably be, no contention that the Seattle plant was merely an accretion to the Los Angeles and Oakland bargaining units. Apart from the hundreds of miles separating these plants, both Englander and the Teamsters maintained before the Board that there was no "master agreement" between them covering the Seattle plant. Respondents asserted that their references to a contract pertained only to a "pattern form of contract" which the Teamsters had with Englander elsewhere. But the basic facts remain that respondents got together prematurely and agreed to have this "pattern form of contract" at the Seattle plant before the plant opened for production or a majority of the employees had been hired.

¹¹ Before the Board the Teamsters attempted to explain away the Testerman incident by asserting that this reference was to a jurisdictional agreement between the Teamsters and the Upholsterers union. However, since Testerman belonged to the Furniture Workers' union and not to the Upholsterers (R. 227), it is difficult to see why such an agreement should be of any concern to her or what occasioned the Teamsters' comment.

Section 7 of the Act guarantees to employees the right to "bargain collectively through representatives of their own choosing." Section 9 (a) further provides that "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining * * *" (emphasis supplied). The Act thus adopts "the principle of majority rule * * * a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess. p. 13." *N. L. R. B. v. A. J. Tower Co.*, 329 U. S. 324, 331. Here, the majority of employees was effectively foreclosed from selecting its bargaining representative or making known its wishes as to the terms or conditions of employment which the bargaining representative was authorized to seek on its behalf. Such a result is plainly inconsistent with the Act's principle of majority rule and its basic policy of affording employees the fullest freedom in the exercise of their right to bargain through representatives of their own choosing.

Moreover, the premature contract placed the Teamsters in a position of prestige and power which facilitated its recruitment of members among the Englander applicants. Following Factory Manager Hunt's statement on February 13 that the Teamsters had a right to ask applicants to come to the plant because it had a contract with Englander, the job

seekers flocked to the Teamsters Hall to apply for membership en masse (*supra*, p. 10).¹³

Indeed, even if (contrary to what we have shown) the record did not justify the Board's finding that such an agreement actually existed prior to February 14, Englander's repeated references to a contract with the Teamsters led the applicants to believe that one did exist and hence were equally effective in enhancing the Teamsters' status and aiding its recruitment campaign. Such assistance and support is not only manifestly unlawful but, as the Board has previously had occasion to call to Englander's attention (*The Englander Company, Inc.*, 114 NLRB 1034, 1042), "is 'aggravated where, as here, the agreement that grants recognition also requires the covered employees as a condition of employment to join and pay dues to a labor organization they have not freely chosen.' "

Before the Board, both Englander and the Teamsters challenged the evidentiary basis for the premature contract finding, asserting that it was possible to draw different inferences from certain incidents in the record. However, "the Board was not obliged to consider the facts and incidents * * * separately and in isolation. It had a right to consider them

¹³ That they may have done so on the advice of their own union representatives to do whatever was necessary to obtain employment at the Englander plant, does not alter Englander's role in assisting the Teamsters. The Furniture Workers had picketed the plant for over a month and abandoned their protest only after Englander had made it clear that it would deal with the Teamsters and no other union (*supra*, p. 10).

compositely and to draw inferences reasonably justified by their cumulative probative effects.” *N. L. R. B. v. Radcliffe et al.*, 211 F. 2d 309, 313 (C. A. 9), certiorari denied 348 U. S. 833. Considering Englander’s total conduct—including Sparrowk’s referral of applicants to the Teamsters, the statements of its supervisors conditioning employment upon membership in the Teamsters, the discriminatory denial of employment to applicant McDonald because of his refusal to join the Teamsters, as well as the pre-February 14 references to “an agreement with the Teamsters”; the record establishes a pattern of assistance and support more than sufficient to sustain the finding of a Section 8 (a) (2) violation.

II. The Board properly found that because the Teamsters was an assisted union, Englander violated section 8 (a) (2), (3) and (1) and the Teamsters violated section 8 (b) (2) and (1) (A) of the Act, by agreeing to and maintaining a union security clause in their contract

As noted *supra*, pp. 7–8, the contract between Englander and the Teamsters contained a union security clause making membership in the Teamsters on and after the 31st day of employment a condition of continued employment at the Seattle plant. The Board’s conclusion that the execution and maintenance of this clause were violative of the Act, is manifestly proper.

Section 7, as implemented by Section 8 (a) (3) and 8 (b) (2), was “designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood” (*Radio*

Officers' Union v. N. L. R. B., 347 U. S. 17, 40). The limitation upon this right is found in the proviso to Section 8 (a) (3), which permits an employer and labor organization to make a union security agreement if the labor organization is "not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice." Since the Teamsters was an illegally assisted union, respondents' union security clause did not meet this statutory requirement and was therefore invalid.¹⁴ *A. M. v. N. L. R. B.*, 311 U. S. 72, 75; *N. L. R. B. v. Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694-5. By executing and maintaining such a clause, respondents respectively violated Section 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act. *N. L. R. B. v. Knickerbocker Plastic Co.*, 218 F. 2d 7, 919-920, 923-924 (C. A. 9); *N. L. R. B. v. Gottfried Baking Co.*, 210 F. 2d 772, 779-780, 782 (C. A. 9); *N. L. R. B. v. F. H. McGraw Co.*, 206 F. 2d 635, 641 (C. A. 6); *Red Star Express Lines v. N. L. R. B.*, 166 F. 2d 78, 81 (C. A. 2).

Respondents contend that there is no evidence that the clause was enforced or intended to be enforced. In view of the discrimination against applicant McDonald and the activity of Englander's supervisors

¹⁴ As the Board noted (B. A. 63), the proviso to Section 8 (a) (3) also imposes the requirement that the labor organization be the representative of the employees as provided in Section 9 (a) in the appropriate collective-bargaining unit covered by such agreement when made." For the reasons discussed *supra*, pp. 13-24, it can scarcely be said that the Teamsters represented an uncoerced majority or that the agreement fulfilled this statutory condition.

in conditioning employment upon membership in the Teamsters, this argument is plainly without foundation. In any event, the execution or maintenance of an illegal union-security agreement, "even apart from its actual enforcement, constitutes 'discrimination in regard to hire'" or tenure of employment "and hence falls squarely within the prohibition of Section 8 (a) (3)." *N. L. R. B. v. Gottfried Baking Co.*, *supra*, 210 F. 2d 779-780. See also, *Eichleay Corp. v. N. L. R. B.*, 206 F. 2d 799, 803 (C. A. 3); *Red Star Express Lines v. N. L. R. B.*, *supra*, 196 F. 2d at 81; *N. L. R. B. v. McGraw Co.*, *supra*, 206 F. 2d at 641. For, as the Second Circuit stated in the *Red Star* case, "the mere existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union."

Nor is there merit to the Teamsters' further argument that the existence of the clause was not an unfair labor practice because none of the employees knew about it prior to February 15 or 16.¹⁵ This argument is premised on the erroneous assumption that the clause was invalid merely because the contract was premature and that a valid union-security contract could have been executed on or after February 15. However, as shown *supra*, p. 12, the Board's finding of illegal assistance rests, not only on

¹⁵ The record casts doubt on the accuracy of the assertion that none of the applicants knew about the clause prior to February 15 (R. 205-206, 234, 271-272).

e premature contract, but also upon other acts of assistance beginning on January 11, and continuing through February 23. The effect of this assistance remained undissipated and tainted the clause with illegality throughout the entire term of the contract.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.¹⁶

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APRIL 1958.

¹⁶ In its answer to the Board's petition for enforcement (Para. 6), the Teamsters assert that "the scope of the Board's order has no reasonable relation to the offenses found, or to the likelihood of their recurrence." The Teamsters raised no objection before the Board to the scope of the order, which was substantially the same as that recommended by the Trial Examiner. It is accordingly precluded from making any such objection now. *N. L. R. B. v. District 50, etc.*, 355 U. S. 453, 3-464; *N. L. R. B. v. Giustina Bros. Lumber Co.* (C. A. 9), February 28, 1958, 41 LRRM 2711.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from all or any of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *.

No. 15832

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL
UNION No. 117, AFL-CIO, *Respondents*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT UNION

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THE ARGUS PRESS, SEATTLE



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United States Court of Appeals
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Respondents.

No. 15832

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT UNION

COUNTER-STATEMENT OF THE CASE

The statement of the case contained in petitioner's brief (pp. 2-12) does not purport to contain a full exposition of the relevant and material facts of this case. Petitioner has chosen merely to present those "subsidiary facts upon which the (Board's) findings rest" (See petitioner's brief, p. 3).

Respondent union believes that for this court to properly exercise its appellate function of reviewing the "whole record" in this case, it is essential that a more complete statement of the facts be made.¹ Ac-

¹Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Section 141 *et seq.*, provides that the Board's findings of fact are conclusive only where "supported by substantial evidence on the record considered as a whole." See *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 95 L.ed. 456 (1951).

cordingly, we present this counter-statement of the case.

Respondent union has been found by the National Labor Relations Board to have violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, by executing and maintaining a collective bargaining contract, containing a union security clause, with the respondent Englander company. It is the Board's theory that this conduct violates the Act because at the time such contract was executed, respondent union was being illegally "assisted" by respondent company (R. 88, petitioner's brief, pp. 24-27).

The record contains the following evidence relating to the conduct of respondent union.²

The Facts

Prior to January, 1956, respondent company operated two manufacturing plants on the west coast where it produces upholstered furniture and bedding, one at Los Angeles and the other at Oakland, in California (R. 317). The employees working in these plants were covered by collective bargaining contracts with local unions of the International Brotherhood of Teamsters (R. 125, 317). These agreements were similar (R. 125, 285, 303, 318) and they both contained the signature of Joseph Dillon, a representative of the Western Confer-

² Actually, the record contains only brief references to the activities of respondent union. At the hearing the attorney for the General Counsel directed the brunt of his case against the respondent company. He did not call a single officer or agent of respondent union to the stand, even as an adverse witness, and the union presented no witnesses of its own. Even the Board's brief filed in this action makes but brief mention of respondent union (pp. 24-27).

ence of Teamsters stationed in San Francisco (R. 126-318).

In the latter part of 1955, John Sparrowk, a vice-president of respondent company in charge of its west coast operation, made a trip to Seattle, Washington, as a preliminary step in locating a third manufacturing plant for Englander in that city (R. 126-127). When Sparrowk returned to his Oakland headquarters, he was contacted by Dillon who inquired as to what he had been doing in Seattle. Sparrowk replied that he was attempting to locate facilities for a new plant (R. 126-127, 294-295). Dillon commented that, inasmuch as the Teamsters had contracts at the other Englander plants, they would also expect to have Englander's Seattle operation under contract (R. 126-127).

Englander's intention to acquire a Seattle plant materialized and in January, 1956, Sparrowk returned to Seattle where he made final arrangements to lease the plant and purchase some of the inventory and equipment of Craftmaster, Inc., a firm engaged in the same business as Englander (R. 116-117, 287, 288, 319-320). Some of the Craftmaster employees were members of Local 5 of the Upholsterers International Union of North America, A.F.L.-C.I.O.³ Some were members of Local 3197 of the United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O.⁴ and a few truck drivers were members of an unidentified Teamsters Local (R. 117-118, 156, 323). These unions had had col-

Hereafter referred to as the Upholsterers.

This union is referred to in the record as Furniture Workers, Local 3197, and is hereafter referred to as Furniture Workers.

lective bargaining agreements with Craftmaster (R. 117-118, 151-152, 155-156, 323), but these agreements were not assumed by Englander (R. 117-118, 289).

On January 9, 1956, while Sparrowk was in Seattle making final arrangements for the acquisition of Craftmaster facilities, Dillon introduced him to Bill Williams, the secretary-treasurer of respondent union. Dillon repeated his earlier comment about the desire of the Teamsters to obtain representation rights and get a contract covering Englander's Seattle operation (R. 292, 312).⁵ Sparrowk told both Dillon and Williams that the company would do business with whichever union "could show us that they had the majority of the people represented by their union" (R. 128) and he made no commitment concerning recognition of respondent union (R. 292).

Subsequently, respondent union undertook an organizing campaign among the former Craftmaster employees, who were expecting to be re-employed by respondent Englander. The union invited groups of these employees to visit the Teamsters hall where agents of the union explained to them the Teamsters' health and welfare plan and the pension plan which the union hoped to get from Englander (R. 342). Reference was also made to the fact that the Teamsters had secured contracts from Englander in other states (R. 360).

The respondent union's organizing campaign, however, immediately clashed with claims by the Uphol-

⁵ Although respondent company had not operated a manufacturing plant in Seattle prior to January, 1956, it had warehoused some of its products in that city (R. 287). This warehousing operation was handled by members of the respondent union (R. 292).

sterers and the Furniture Workers that the "jurisdiction" of the Seattle plant belonged to them.⁶ Accordingly, representatives of these other unions met with Bill Williams, of respondent union, in an effort to resolve the jurisdictional claims (R. 89-190, 279-280).⁷ The discussion at this meeting pertained largely to a pending effort by the Teamsters International Union and the Upholsterers International Union to resolve the jurisdictional issue under the terms of a mutual assistance pact to which those unions are parties (R. 190).⁸

On February 6, 1956, representatives of the Furniture Workers met again with Williams. Williams told them that the Teamsters International and the Upholsterers International had reached an agreement under the terms of which the Upholsterers formerly employed in the Craftmaster plant would retain their membership rights in Local 5; however, they would join respondent union and pay dues in order to be eligible for coverage under the Teamsters health and welfare plan. Williams then explored the possibility of reaching agreement with the Furniture Workers on the juris-

⁶Both the Upholsterers and Furniture Workers informed Sparrowk that they had "jurisdiction" in the plant and they demanded recognition by the company (R. 152-154, 170-171). When this demand was refused, both unions placed picket lines around the plant, even before it was officially acquired by Englander (R. 172-173, 183, 199, 378).

⁷The date of this meeting was not specified. It was some time before February 6, 1956 (R. 279).

⁸Although the record does not reveal it, the Teamsters and the Upholsterers have been parties to a mutual assistance pact dealing with organizing and jurisdictional matters since February 17, 1954. The text of this document can be found at 35 LRRM 85.

dictional question, offering a proposal by which the Furniture Workers could retain jurisdiction in the mill room, giving jurisdiction over other jobs to the Teamsters. One of the representatives of the Furniture Workers (Truman) was doubtful as to whether the Upholsters and the Teamsters had actually reached an agreement and he told Williams that until there was evidence that the other two unions had actually settled their differences, there was little to talk about (R. 160-161, 277).

On February 10, 1955, one Jeanette Testerman, a former Craftmaster employee and member of the Furniture Workers, received a call from a man she identified as Mr. Bombardier, an assistant business agent of respondent union, although she had never heard his voice before. Testerman testified that:

“ . . . he asked me if I wanted to go to work on the following Monday. I asked him if the labor dispute was straightened out and he said that they had a contract here and that as far as the picket line that we had on there, it wasn't a legal picket line.” (R. 227)

A few days later, on February 13, 1956, after Sparrowk announced that the plant would open for production, the Upholsterers called a special meeting of their members. Royer, the local business agent, invited Bill Williams of respondent union to address the meeting (R. 201). Royer first spoke to the members informing them that he had received a wire from the Upholsters International Union stating that the members who formerly worked for Craftmaster were to work

under the Teamsters' jurisdiction (R. 202).⁹ Williams then spoke to the group telling about the Teamsters insurance programs and pension plan and explaining that the Englander plants in California had Teamster contracts (R. 204). Williams and other Teamster officials then left the meeting and the Upholsterers voted unanimously in favor of a proposal to join the Teamsters Union and work under the Teamsters agreement (R. 205, 351-353). One of the members then suggested that they adjourn the meeting and go to the Teamsters Hall to get further information (R. 353).

Thus, on the afternoon of February 13, the Upholsterers' members went to the Teamsters Hall in Seattle where they were again addressed by officials of respondent union. Williams read to them from a contract that the Teamsters had obtained at other Englander plants and answered questions from the members, especially regarding the Teamsters pension plan and other benefits that they hoped to get from Englander (R. 205-206, 354, 356). Books and pamphlets were handed out stating how the benefits under Teamster contracts were better than those negotiated by the Upholsterers (R. 354). Applications for membership in respondent union were then circulated (R. 354-355).

On the same afternoon, February 13th, Jeanette Testerman went to the Teamsters Hall and talked to

⁹ Apparently the agreement made by the International unions was that the Upholsterers would relinquish jurisdiction over the former Craftmaster employees, in exchange for which, the Teamsters would relinquish jurisdiction over several hundred employees in the Los Angeles area (R. 354).

Bombardier and Williams of respondent union (R. 230). These men explained that the Teamsters had contracts with Englander in other states and they discussed the merits of the health and welfare program and the pension program and other fringe benefits that they hoped to get in a contract with the company (R. 230, 240). Testerman then signed an application for membership in respondent union and a document which stated, in part, that the signer accepts "all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company" (GC Ex. 9, R. 233, 366). Testerman signed these documents voluntarily (R. 239-240).

On the following day, February 14, 1956, the Furniture Workers Local held a meeting. During the course of this meeting Truman instructed the members to go to the Teamsters Hall and join the respondent union (R. 167-168, 173, 175). Truman did this on his own. He had no communication with respondent union concerning such an instruction (R. 173-174). Several members went immediately to the Teamsters Hall and joined respondent union (R. 247-248). These members were under the impression that the Furniture Workers Union was requesting that they join respondent union (R. 249, 252, 254, 265, 269-270).

Some time prior to February 6, 1956, respondent union submitted a proposed contract to Englander Company officials at Chicago, Illinois (R. 142, 303, 319). This contract, to which Dillon and Williams had affixed their signatures, was a duplicate copy of the contract in effect at the Los Angeles plant, except for

the designation of the parties (R. 308). It did not, however, contain any wage rates (R. 285). On or about February 6th, a company official in Chicago (Pink) called Sparrowk and told him that the Teamsters had submitted a proposed contract similar to the Los Angeles contract. Pink told Sparrowk that he was going to send the contract on to him, but giving him careful instructions that he was not to sign the contract, or any other contract, until he was convinced that the union involved represented a majority of the employees at the Seattle plant (R. 142, 303-304).

Late in the afternoon on February 13, 1956, Williams called Sparrowk, telling him that a majority of the employees in the potential labor pool in which Englander was interested had signed application blanks in the respondent union (R. 310). Sparrowk said he would like to have proof of that fact and he then went to Williams' office where Williams presented him with a pile of application blanks. Sparrowk examined and counted the application blanks and found that they numbered more than 60 (R. 314). He was convinced at that time that respondent union represented a proper majority of the production and maintenance employees who were working at the plant, or who had been engaged to report for work at the plant (R. 314-15).¹⁰

Williams called Sparrowk on the following day, February 14, and said he had an additional twenty or more applications (R. 313, 325). On the next day, February 15, 1956, just prior to Sparrowk's departure for

¹⁰ On February 14 and 15, 1956, the Company began full production. As of February 15th, the company employed 94 regular production and maintenance employees (GC Ex. 13, R. 372-379).

Oakland, Williams came to the plant where he presented Sparrowk with the document known as general counsel's exhibit 9, which contained some 90 signatures (R. 366-367). Williams told him that this document represented the signatures that the union had of people who had made application to that date. Sparrowk then returned to Oakland where he signed the contract submitted by respondent union and returned it to Chicago (R. 141, 308, 311). The contract was effectuated on February 15th, the day on which the company began making payments of pension premiums (R. 311). The respondents had not agreed, however, on wage rates to be included in the contract. At the time of the hearing in this case, they had yet to complete negotiations on that issue (R. 285).

The contract contains a union security clause (GC Ex. 2, R. 360-361). There is no evidence that such clause has ever been enforced.

ARGUMENT

I. The Board Order Against the Respondent Union Is Null and Void and the Board's Petition for Enforcement of This Order Should Be Denied

The Board has found that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by executing and maintaining a collective bargaining contract, containing a union security clause, with respondent company at a time when it (the union) was receiving "illegal assistance" from the company (R. 88; petitioner's brief, pp. 24-27). Among other matters, the Board's order requires the union to surrender its con-

tract with the company until it has been appropriately certified by the Board (R. 94).

To establish that the union received illegal assistance the Board relies on a finding that the company and the union executed the collective bargaining contract at a time when the number of employees at work was not representative of the company's anticipated work force.¹¹ This is a choice example of circuitous reasoning—to prove there was an illegal contract the Board points to the assistance—to prove there was illegal assistance the Board points to the contract.

There are two questions which must be resolved with respect to whether the Board's order regarding respondent union is valid and enforceable (1) Is the Board's finding that the respondents executed a collective bargaining contract before a representative number of employees were at work supported by substantial evidence on the record as a whole? and (2) Is the Board's finding (or, more properly, its conclusion) that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) based upon proper findings of fact and is it correct as a matter of law?

For the reasons and arguments set forth hereafter we contend these questions should be answered in the negative and that enforcement of the Board's order should be denied.

¹¹ The Board also found other acts of "illegal assistance," in addition to the execution of the contract (R. 87-88), but there is no evidence that these acts, if they existed, were either solicited by respondent union or that the union subsequently acknowledged or ratified them. The only "assistance" in which the union knowingly acquiesced, if any, was in the execution of the contract.

A. The Board's Finding that Respondents Were Parties to a Collective Bargaining Contract at a Time When the Number of Employees at Work Was Not Representative of the Company's Anticipated Work Force Is Not Supported by Substantial Evidence on the Record Before the Board Considered as a Whole

The evidence is undisputed that the respondents formally executed a collective bargaining contract on February 15, 1956, when John Sparrowk, West Coast vice-president of the company, affixed his signature to a contract proposed by the respondent union, after receiving evidence that the union represented a majority of the employees at the Seattle plant (R. 141-142, 303-304, 310-311, 313-315, 319). The Board did not find that the union did not represent a majority of the employees on February 15th, or that the number of employees at work on that date was not representative of the company's normal work force.

The Board did find, however, that the respondents, while not formally executing their contract until February 15th, had actually put the contract into effect before that date (R. 88). The Board is not certain exactly when the contract was first put in force, except that it was "prior to February 14th" (R. 88). The trial examiner took the view that the contract was in effect as early as February 10th (R. 57-58).

To support its finding that a contract was in effect prior to February 14th, the Board points to the following pieces of "evidence":

"(a) In the autumn of 1955 and again on January 9, 1956, Dillon, a representative of the Western Conference of Teamsters, told the respondent

employer's Vice-President Sparrowk that the Teamsters expected to have the Seattle operation under contract, the same as elsewhere in the country.

“(b) At a plant meeting on February 13, 1956, that included representatives of the charging union, the respondent employer and the respondent union, Evans, a representative of the Furniture Workers remarked that Teamsters' representative Williams was apparently acting as the respondent employer's 'personnel manager.' Factory Manager Hunt replied that Williams had the right to ask job applicants to come to the plant inasmuch as the Teamsters held an agreement with the respondent employer.

“(c) Vice-president Sparrowk testified that, on February 6, 1956, Vice-President Pink telephoned him from the employer's Chicago, Illinois, headquarters to say that a contract signed by representatives of the respondent union was in the office.

“(d) On January 26, 1956, Sparrowk told Truman, a representative of the Brotherhood of Carpenters, that the respondent employer had a 'master agreement' of nation-wide scope with the Teamsters International, that he did not want to jeopardize good working relations with the Teamsters by signing a contract for the Seattle plant with another union, and that he feared reprisals if he did so. Also, on February 3, Sparrowk refused Truman's request for a consent representation election to be conducted by the Board because of a 'master agreement' with the Teamsters.

“(e) On February 10, 1956, Bombadier, a representative of the respondent union, telephoned applicant Testerman to ask her if she wished to go

to work. Bombadier told Testerman that ‘they had a contract at the plant.’

“(f) As early as February 13, 1956, applicants for employment appeared at the respondent union’s office and were asked to sign a document which recited that the signatory agreed to accept ‘all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company * * *.’

“(g) The absence of any evidence of contract negotiations between the Respondent Employer and the respondent union together with the fact that the contract in evidence is little more than a duplicate of the one covering the respondent employer’s Los Angeles plant, even to the extent of bearing execution date, October 1, 1955, and effective date, December 1, 1955—dates prior to the acquisition of the Seattle factory.” (R. 89-90)

A careful analysis of this “evidence” show that it does not support the inference which the Board draws, and it is not “substantial evidence considered on the record as a whole.”

1. Items of “evidence” enumerated (a), (c) and (g) considered in the context in which they appear in the record do not support the inference that a contract was in effect prior to February 14th

Assuming that items of evidence (a), (c) and (g) constitute “substantial” evidence,¹² a fair reading of this evidence, in the context in which it appears in the

¹² It is unlikely that this evidence rises to the dignity of “substantial” evidence. For example, items (a) and (c) are hearsay. Indeed, item (c) was specifically characterized by the trial examiner as being “hearsay evidence” (R. 60). See discussion of hearsay evidence, *supra*, at p. 17.

record, does not support the inference that a contract existed before February 14th.

The fact that Dillon told Sparrowk that the Teamsters "expected" to get a contract at the Seattle plant (item (a)) does not reasonably infer that the respondent union actually obtained such a contract before February 14th. Indeed, in the very conversation when Dillon told Sparrowk of this expectation, Sparrowk informed Dillon (and Williams) that the company would do business with whichever union could obtain majority representation (R. 128). The desire of the respondent union to win recognition was no different than that of the other unions involved. Both the Furniture Workers and the Upholsterers informed Sparrowk that they expected to be recognized at the Seattle plant and obtain a contract (R. 152-154, 170-171). In fact these unions openly and forcefully demonstrated their "expectation" of being recognized by placing picket lines around the plant, even before it was officially acquired by the respondent company (R. 172-173, 183, 199, 378).

Similarly, the fact that the respondent union submitted a proposed contract to the respondent company on or before February 6th, 1956 (item (c)) is not probative on the issue of when the contract was made effective. At the same time that Vice-President Pink told Sparrowk that a contract had been submitted by the union, he also told him that he was not to affix his signature to that contract, or any other contract, until he was convinced that the union involved represented a majority (R. 142, 303-304). Sparrowk followed these instructions, and did not sign the contract until Febru-

ary 15th, after he became convinced that the respondent union represented a majority of the employees at the Seattle plant (R. 311, 314-315).

Lastly the Board notes that the contract submitted by respondent union and signed by Sparrowk on February 15th, is a duplicate of the one covering the company's Los Angeles plant, and that there is no evidence that this contract was specifically negotiated (item (g)). It is beyond comprehension how the type of contract signed, or the quantity of negotiations leading up to that contract, is persuasive on the issue of *when* the contract was made effective. The fact that the parties may have agreed on a contract without any "table-thumping" negotiations is readily explained by the prior relationship between the Teamsters and Englander involving the company's California plants. Except for wage rates, the Teamster contracts at the California plants were similar (R. 125, 285, 303, 318). This "pattern-form" of contract was apparently desired by the respondent union and approved by the respondent company, on condition the union obtained majority representation.¹³ In view of the Teamster contracts at the California plants, there was no reason to expect the parties to negotiate at length over the Seattle contract. The only issue upon which one might expect some negotiation would be wages, and it is to be noted,

¹³ What the union did, apparently, was obtain a mimeographed copy of the California "pattern-form" contract, insert the name of the respondent union, and submit it to the company. Sparrowk testified that except for handwritten insertions, the contract was identical to the California contracts (R. 284-285, 303). This explains why the contract contains an execution date of October 1, 1955, a date several months prior to Englander's acquisition of the Seattle plant.

in this regard, that the respondents did not agree on wage rates for the Seattle plant. At the time of the hearing in this case, they had yet to complete negotiations on the wage issue (R. 285).

In summary, we submit that the expectation of the respondent union to win recognition at the Seattle plant, the union's submission of a proposed contract, identical to the California "pattern-form" contract, and the signing of that contract by the company without lengthy negotiations, *do not* support an inference that the contract was placed in effect before February 14th.

2. Items of "evidence" enumerated (b), (d), (e) and (f) constitute hearsay evidence

The items of "evidence" enumerated by the Board as (b), (d), (e) and (f) (R. 89-90). and said by the Board to support its inference that the respondents executed a collective bargaining contract before February 14th, 1956, are all items of hearsay evidence.

Each item is testimony or written evidence, presented in court, of a statement made out of court, such statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. See *McCormick on Evidence*, 1954 Ed., Sec. 225.

The statement made by Factory Manager Hunt to Evans (item b); the statements made by Sparrowk to Truman (item d); the telephone statement made by Bombardier to Testerman (item e); and the document with the notation on it (item f) are all used to prove

the truth of the matters asserted therein (*i.e.*, that a contract or agreement between the respondents was in effect). But, with the exception of Sparrowk, the declarants were not called as witnesses and made available for cross-examination. Hunt did not testify, Bombardier did not testify, and the individual who put the notation on the document circulated at the Teamsters Hall did not testify.

It is the statutory requirement that a finding in an unfair labor practice case be based upon "substantial" evidence. Sec. 10(e). See also *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.ed. 456 (1951).

Hearsay evidence is not "substantial" evidence. *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197, 83 L.ed. 126 (1938). Thus, the Board (at least prior to this case) and the courts do not allow findings to be based solely upon hearsay evidence. *Ohio Associated Telephone Co.*, 91 NLRB 932 (1955); *N.L.R.B. v. Bell Oil & Gas Co.*, 98 F.2d 406 (5th Cir. 1938); *N.L.R.B. v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940), cert. denied, 312 U.S. 689, 85 L.ed. 1126; *A. E. Staley Mfg. Co. v. N.L.R.B.*, 117 F.2d 868 (7th Cir. 1941), *Oughton v. N.L.R.B.*, 118 F.2d 486 (3rd Cir. 1941); *N.L.R.B. v. Washington Dehydrated Food Co.*, 118 F.2d 980 (9th Cir. 1941); *N.L.R.B. v. Amalgamated Meat Cutters*, 202 F.2d 671 (9th Cir. 1953); *N.L.R.B. v. Haddock Engineers*, 215 F.2d 734 (9th Cir. 1954).

Lest it be argued that these items of evidence would qualify as an exception to the hearsay rule under the theory that they constitute "admissions against interest" it should be pointed out that the record is barren of

any foundation evidence which would properly qualify them as admissions. First, there would have to be evidence that the declarants were duly authorized agents of the union or the company having the authority to make statements on behalf of their principals, and that they made the statements within the scope of their authority. This is a generally accepted rule. See 20 Am. Jur., Evidence, Sec. 589. And it is a rule of evidence in force in the State of Washington. *Tacoma and Eastern Lumber Company v. A. B. Field and Company*, 110 Wash. 79, 170 Pac. 360; *State ex rel. Hamilton v. Standard Oil Company*, 190 Wash. 496, 68 P.2d 1031.

Secondly, admissions must be expressed in definite, certain and unequivocal language. See 20 Am. Jur., Evidence, Sec. 546, and the Washington cases *Dollar v. Northwestern Improvement Company*, 72 Wash. 1, 129 Pac. 578; and *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165. The items of evidence relied upon by the Board could not meet this test.

The statement of Hunt that the "Teamsters held an agreement with the Englander Company," and Sparrowk's asserted reference to a "master agreement" are far from clear, certain and unequivocal assertions that Englander and respondent union Local 117 were parties to a contract covering the Seattle plant. Sparrowk's asserted reference to a "master agreement" is especially dubious because no such agreement was ever produced and Sparrowk denied that one existed (R. 295).¹⁴

¹⁴ In any event, if these asserted statements were properly characterized as "admissions," they might be binding upon the company but they are not binding on respondent union.

For similar reasons, the document circulated at the Teamster's hall, and Bombardier's telephone conversation with Testerman, fail to constitute "admissions" by the respondent union that it was a party to a collective bargaining contract before February 14th.

The Document Signed at the Teamsters' Hall

The document which some new members of respondent union signed while at the Teamsters' hall contained, in part, the following notation:

"We . . . accept as a new employee of the Englander Company, all working conditions contained in the contract in effect between the International Brotherhood of Teamsters and the Englander Company. . . ." (G.C. Exhibit 9, R. 366)

This language was certainly not clear and unequivocal in the eyes of the trial examiner. He spent several paragraphs explaining why he felt that the reference to the "International Brotherhood of Teamsters" meant respondent union Local 117 (R. 55-58).

Viewed in the light of other evidence in the record, this document appears to be simply an indication that the new members of respondent union were willing to have for a collective bargaining contract at the Seattle plant the same "pattern-form" of contract in effect at Englander's California plants.

As we have previously noted, respondent company has contracts with the Teamsters at its Oakland and Los Angeles plants which are basically the same, except for wage items (R. 125, 285, 300, 318). During respondent union's organizing campaign repeated ref-

erences were made to this California "contract." In January, for example, Bombardier (assistant business agent of the union) told one prospective member, who wanted to know what the Teamsters had to offer, that the Teamsters had contracts with Englander in other states. The witness was asked if Bombardier mentioned anything about a contract covering the Seattle plant, and he answered, "no" (R. 360).

Again, one of the general counsel's witnesses (Royer) testified that at a meeting of the Upholsterers' local, Williams (Secretary-Treasurer of respondent union) explained that the Teamsters had contracts with Englander in California (R. 204) and that at a subsequent meeting Williams read the terms of a contract "they have up and down the coast" (R. 205). This was not a signed contract, but was sort of a form contract (R. 205-206).

Another of the general counsel's witnesses (Testerman) testified that she went to the Teamsters' hall on February 13 and that the union officials there explained that the Teamsters had contracts with the company in other states (R. 240) and a contract was exhibited to her and the other people with her (R. 234). The union officials also explained the health and welfare plan and the other benefits they hoped to get in Seattle, apparently referring to the health and welfare clause in the California contract (R. 230).

Still other witnesses (Walters and Dantini) testified that the officials of Local 117 explained, in a meeting which they attended, the health and welfare plan and

the pension plan they hoped to get from Englander (R. 342, 354, 356).

The foregoing evidence reveals that officials of respondent union, as part of their organizing work, were continually making reference to a contract which the Teamsters had in California with the company and which they hoped to get in Seattle. This contract was unsigned and was more or less a pattern form of contract. Even the attorney for the general counsel, in referring to an unsigned copy of the California contract he offered in evidence as G.C. Exhibit 5, referred to it as a "pattern form of contract" (R. 140).

In summary, when certain members of respondent union attached their signatures to the sheet of paper in question, they were stating their willingness to accept the terms of the *pattern form of contract* which the Teamsters had obtained in California, which had been exhibited to them in the organizing campaign, and which respondent union hoped to sign with Englander for the Seattle plant. This is a more probable explanation of what the notation means, and it is an explanation consistent with other evidence in the record.

The Phone Call

Likewise, when Testerman talked to Bombardier on February 10 and when, in her words—

“I asked him if the labor dispute was straightened out and he said that they had a contract here and that as far as the picket line that we had there, it wasn't a legal picket line.” (R. 289)

—Bombardier was, in all likelihood *either* referring to

the *pattern form of contract* which was a part of the organizing effort of respondent union (and which Bombardier himself exhibited to Testerman just three days later (R. 234)) or else he was referring to a contract or agreement which the Teamsters had reached with the Upholsterers' union in an effort to end the jurisdictional struggle between the unions. This meaning is more probable in view of the fact that Bombardier was replying to Testerman's inquiry as to whether the "labor dispute was straightened out." This is consistent with other testimony to the effect that four days earlier, on February 6, officials of Local 117 were under the impression they had reached an agreement with the Upholsterers on the matter of jurisdiction (R. 161).

In any event, Bombardier's exact words were not quoted, and from what is given, a number of different meanings are possible, the most reasonable of which, as we have noted, are contrary to the interpretation made by the Board.

In summary, we have pointed out how items of evidence (b), (d), (e) and (f) are hearsay evidence, failing to meet the statutory test of "substantial evidence." It cannot be contended that these items of evidence constitute exceptions to the hearsay rule on the ground they are "admissions against interest" for, among other reasons, they lack the clarity, definiteness and unequivocal character necessary for a proper admission against interest.

Furthermore, we have shown how this evidence is capable of giving rise to different inferences, inconsistent with the inference drawn by the Board. This is a

further reason why the evidence is not “substantial evidence”:

“Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely amounts to a suspicion or which amounts to a scintilla or which gives equal support to inconsistent inferences.” *N.L.R.B. v. Shen Valley Meat Packers, Inc.*, 211 F.2d 289 (4th Cir. 1954).

“A trace or a wisp of evidence, a single, vague and inconclusive reply by a single witness that could reasonably be construed in various ways, either in support of, or contrary to, the Board’s contention is not substantial evidence. . . .” *N.L.R.B. v. McGraw & Co.*, 206 F.2d 635 (6th Cir. 1953).

3. The Board’s inference that a contract existed prior to February 14th is unreasonable in light of the entire record

Assuming (for sake of argument) that the Board has properly inferred, from proper items of substantial evidence, that the respondents were parties to a contract before February 14th, that inference should be rejected as *unreasonable in the light of the entire record*. The Board can properly draw inferences from “substantial” evidence, but the inferences drawn must be reasonable. *Sax v. N.L.R.B.*, 171 F.2d 769 (7th Cir. 1948); *N.L.R.B. v. Sunset Minerals*, 211 F.2d 224 (9th Cir. 1954). See also *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 95 L.ed. 456 (1951).

Considering the entire record, the presence of evi-

dence therein, and the lack of evidence therein, we submit the following reasons why the inference drawn by the Board is not reasonable:

(1) *There is no evidence* in the record that any employee or prospective employee of the company's Seattle plant ever saw a contract which purported to cover the wages and working conditions at that plant before February 15. To the contrary, one of the leading witnesses for the General Counsel was asked if she ever had seen such a contract and she answered in the negative (R. 236).

(2) *There is no evidence* that either the company or the union put into effect any provisions of this contract before February 15. *There is no evidence* that before that date wages, hours or working conditions at the Seattle plant were governed by this contract. The only evidence of when the contract was implemented is Sparrowk's undisputed testimony that the company began making pension payments as of February 15 after he affixed his signature to the contract (R. 311). Most important, *there is no evidence* that the union security clause of this contract was implemented in any way before February 15. In fact, there is no evidence in the entire record that it was ever implemented.

(3) *There is substantial evidence* that respondent company was unaware of any contract being in effect before February 15. Sparrowk testified, without contradiction, that when he went to Seattle to locate a new plant he had no instructions from his superiors with respect to recognition of the Teamsters' union and the Teamsters did not present him with any agreement (R.

299). When Sparrowk met with Dillon and Williams on January 9th and heard them express their desire to win recognition at the Seattle plant, he informed them that the company would do business with whichever union represented a majority of the people in the plant (R. 128). He made no commitment regarding recognition of respondent union (R. 292). The only contract he knows of concerning the Seattle plant is the respondent union's proposed contract which was sent to him from Chicago and to which he attached his signature on February 15th, after becoming convinced that the respondent union represented a majority (R. 283, 303-304).

(4) *There is substantial evidence* that respondent union was unaware of any contract being in effect before February 15. The record contains undisputed testimony to the effect that the union was busy signing up members from among the prospective employees of Englander as late as February 13 and 14. One of the general counsel's main witnesses testified that when she went to the Teamsters' hall on the 13th the union officials there, in an attempt to solicit membership, explained the merits of the health and welfare and pension plans and other features of the contract *they hoped to have* with Englander (R. 230, 240). Another witness testified that, on that date, the officials of Local 117 handed out literature and pamphlets and explained what a good program they had to offer (R. 354). This raises an important and crucial question. If respondent union had a contract with Englander as early as February 10, as the Board claims, a contract which con-

tained an exclusive recognition clause and a union security clause, *why was the union still attempting to organize prospective employees up until the time the contract was formally signed? Why did the union bother to obtain a majority, if through premature execution of a contract, they did not need a majority?* The answer is obvious—no contract was in effect until February 15.¹⁵

For the foregoing reasons, the Board's inference that the respondents were parties to a collective bargaining contract before February 14th should be set aside as unreasonable.

B. The Conclusions of Law Entered by the Board with Respect to Respondent Union Are Based Upon Unsupported Findings of Fact, and, in Addition, Are Incorrect as a Matter of Law

The Board's legal theory, in this case, is that respondent union has violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by executing and maintaining a collective bargaining contract, containing a union security clause, at a time when it was receiving "illegal assistance" from respondent company (R. 88; Petitioner's brief, pp. 24-27). This conclusion is founded upon the Board's finding that respondent company "assisted"

¹⁵ It is also significant that the representatives of the Furniture Workers and the Upholsterers, who met on two occasions prior to February 15th with Williams, the secretary-treasurer of the respondent union, never heard Williams claim that the union had a contract at the plant. Williams' comments at these meetings related solely to an attempt by the three unions to resolve their competing jurisdictional claims. The only "agreement" Williams mentioned was a pending agreement between the Upholsterers International and the Teamsters International on the jurisdictional question (R. 160-161, 189, 190, 277, 279-280). If, as the Board claims, respondent union already had a contract covering the company's Seattle plant, there would have been no reason or necessity for Williams to participate in such discussions.

respondent union by entering into a collective bargaining contract with it, at a time, prior to February 14th, when the number of employees at work was not representative of the respondent company's anticipated work force. But, as we have demonstrated in the foregoing portions of this brief, the Board's finding that the parties had executed such a contract prior to February 14th is not supported by substantial evidence on the record as a whole. Having no proper factual foundation to support it, the Board's legal conclusion must be rejected.

However, even apart from the lack of supporting evidence, there are additional reasons why the Board's legal conclusions are incorrect.

1. The Board's conclusion that respondent union has violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case is incorrect as a matter of law

Assuming, arguendo, that respondent union did enter into a collective bargaining contract, containing a union security clause, at a time when it was being "illegally assisted" by respondent company, and that this made the union security clause illegal, there is no legal justification for a conclusion that the union thereby violated Sections 8(b)(1)(A) and 8(b)(2). *There is no substantial evidence in the entire record, or a finding by the trial examiner or the Board, that any of the employees knew that the contract, if it existed, contained a union security clause.*

Section 8(b)(2) states, in part, that it is an unfair labor practice for a union to:

“to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ”

Section 8(a)(3) states, in part, that it is an unfair labor practice for an employer:

“by discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization*: Provided, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining union covered by such agreement when made. . . . ” (Emphasis added)

The thrust of an 8(b)(1)(A) and 8(b)(2) charge, as made in this case, is that a union violates those sections of the Act, by merely entering into an illegal union security clause with an employer. The rationale behind this rule is that employees will be “encouraged,” in contravention of Section 8(a)(3) of the Act, to acquire or maintain union membership by the very presence of the clause in the contract. As the Second Circuit has stated:

“The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice. This is so because the existence of

such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge *if he defies the contract* by refusing to become a member of the union.” (Emphasis added) *Red Star Express v. N.L.R.B.*, 196 F.2d 78 (2nd Cir. 1952).

The necessary assumption for this rationale is that the employees *know* the clause is in the contract, either by reading it or being told of it. Where no employee knows of the existence of the illegal union security clause, it is a reasonable conclusion that employees are not being subjected to “encouragement” thereby. *It is logically and practicably impossible for an illegal union security clause to have an effect upon employees who are completely unaware of its existence.* Compare *N.L.R.B. v. Eichleay Corporation*, 230 F.2d 64 (6th Cir. 1956).

Also, there is no evidence in the record, or finding by the trial examiner or the Board, that the union security clause was ever implemented or that the union (or the company) ever intended to implement it. In such a case, the mere presence of the clause in the contract is not a violation of 8(b)(2). *Port Chester Electrical Const. Co.*, 97 NLRB 354 (1951); *Jandel Furs*, 100 NLRB 1390 (1952).

For these reasons, there is no justification for the conclusion of the trial examiner that respondent union violated Section 8(b)(1)(A) and 8(b)(2) by its conduct in this case.

2. The authorities cited by the Board do not support the Board's Conclusion that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case

The weakness of the Board's legal theory involving the liability of respondent union is underscored by the fact that neither the trial examiner nor the Board have cited a single case which can be fairly said to support the Board's position that respondent union violated Sections 8(b)(1)(A) and 8(b)(2) by its conduct in this case. None of the cases cited by the trial examiner at footnote 20 of the Intermediate Report (R. 34) and none of the cases cited by the Board in its brief (pp. 24-27) is a case where a union has been held to have violated Sections 8(b)(1)(A) and 8(b)(2) by executing and maintaining a contract, containing a union security clause, at a time when it (the union) was receiving "illegal assistance" from an employer. Insofar as the authorities cited involve 8(b)(1)(A) and 8(b)(2) violations by unions, they are based on factual situations where the union has executed a "closed shop" agreement, or other type of union security clause obviously forbidden by the statute. None involve a claim that the union was "illegally assisted," or a fact situation similar to that in the instant case.

C. CONCLUSION

For the foregoing reasons, respondent union contends that the Board's order, insofar as it affects respondent union, is null and void, and respondent union

respectfully requests that this court enter a decree denying enforcement of the order.

Respectfully submitted,

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No. 15832

United States Court of Appeals
For the Ninth Circuit

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vs.

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
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**BRIEF FOR RESPONDENT,
THE ENGLANDER CO., INC.**

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| <i>Universal Camera Corp. v. N.L.R.B.</i> (1951) 340 U.S. 474, 95 L.ed. 456..... | 1 |
| <i>Wayside Press, Inc., v. N.L.R.B.</i> (CA-9, 1953) 206 F.(2d) 862 | 18-19, 35, 3 |

TEXTBOOKS

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| 31 C.J.S., Evidence, Sec. 272, p. 1025, <i>et seq.</i> | 2 |
| 31 C.J.S., Evidence, Sec. 354, p. 1128..... | 2 |
| 32 C.J.S., Evidence, Secs. 452, 453, p. 90, <i>et seq.</i> | 2 |

STATUTES

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| The National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sections 141, <i>et seq.</i> | 37, 4 |
| Section 8(a) | 36, 4 |
| Section 8(a) (1) | 36, 4 |
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United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION No. 117, AFL-CIO,
Respondents.

No. 15832

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AND PETITION FOR
REVIEW BY RESPONDENT THE ENGLANDER
COMPANY, INC.

**BRIEF FOR RESPONDENT,
THE ENGLANDER CO., INC.**

COUNTER-STATEMENT OF THE CASE

The Complaint

The Complaint (R. 3-8), alleges against respondent
The Englander Company, Inc., as follows:

IV. That it acquired its Seattle plant shortly before
January 16, 1956, but did not acquire its normal com-
pensation of employees until on or about February 15,
1956.

V. That on or about January 16, 1956, Englander
entered into a collective bargaining agreement with
respondent union, recognizing the union as exclusive

bargaining agent for all production and maintenance employees, and establishing a union security clause reading as follows:

“all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment.”

VI. That starting on or about January 11, 1956, Englander, through its Pacific Coast manager, John Sparrowk, and his subordinates, (1) informed applicants for employment that it had a “national agreement” with respondent union which required all persons selected for hire to become members of a union affiliated with that organization or to pledge allegiance to or support of such union as a condition of hire, and (2) instructed each applicant for employment to go to the offices of respondent union to comply with such conditions precedent to hire which that union imposed.

VII. That from about January 16, 1956, Englander assisted respondent union in arranging occasions when respondent union informed applicants for employment that allegiance to, support of, and membership in respondent union were required as a condition precedent to employment.

The Complaint was issued April 25, 1956 (R. 8). The hearing commenced May 22, 1956 (R. 112). At the commencement of the hearing the general counsel orally moved for and was granted, over objection as being untimely, a trial amendment adding to Paragraph VI the allegation that on February 23, 1956, the plant superintendent, William Moore, offered employment to

ne Robert A. McDonald, but conditioned the offer on McDonald's agreement to join respondent union; that McDonald did not agree to such condition and Englander refused to hire him (R. 113-115).

On the basis of the conduct thus alleged, Englander is charged with having rendered unlawful assistance to respondent union in violation of Sec. 8(a)(2) of the Act, having unlawfully discriminated in regard to hire of employees in violation of Sec. 8(a)(3), and having unlawfully interfered with, restrained and coerced its employees and prospective employees in violation of Sec. 8(a)(1).

B. Statement of Respondent Englander's Contentions

Respondent admits that it entered into a collective bargaining agreement with respondent union, but denies that it did so on or about January 16, 1956, or at any time prior to February 15, 1956. The Board failed to make a finding as to when the Agreement was executed, but did find simply that it was on a number of dates "prior to February 14, 1956," which was before a representative number of employees had been employed (R. 88). This respondent contends that such finding is without any evidentiary support.

With regard to the allegations in Paragraph VI(1), to the effect that Sparrowk and his subordinates informed applicants for employment that the company had a "master agreement" and that applicants for employment had to become members of respondent union, the Board specifically found that such allegations, insofar as Sparrowk himself was concerned, were not supported by the evidence (R. 40-43). The Board

did find that statements of similar import were made by two of Sparrowk's subordinates to employment applicants (R. 50-52). Respondent contends that those adverse findings are not supported by substantial evidence on the record as a whole; that the two asserted instances were isolated and casual, and that one of the instances was *after* the collective bargaining agreement between this respondent and respondent union was admittedly executed.

With regard to the allegations in Paragraph VI(2), to the effect that this respondent instructed each applicant to go to the offices of respondent union and comply with such conditions precedent to hire which that union might impose, it may be stated that the Board did not find that such instructions had been given.

With regard to the allegations in Paragraph VII, that this respondent assisted respondent union in arranging occasions when the union informed job applicants that membership in that union was a condition precedent to employment, the Board likewise made no finding.

The Board did find that the allegations concerning McDonald were supported by the evidence (R. 50-52). Respondent maintains that such evidence is fragmentary and not substantial and will not support a conclusion that respondent committed a violation of the law.

Respondent does not request this court to weigh conflicting evidence but simply to hold that the Board's findings, insofar as they are adverse to this respondent, are not supported by substantial evidence nor infer-

ences which may reasonably be drawn therefrom. Respondent accordingly asks that enforcement of the Board's order be denied and that the order be reversed and set aside.

C. The Principal Participants

It perhaps would be of some assistance to this court to have a list of the principal participants in this controversy. They are as follows:

CRAFTMASTER, INC. is a firm which up to January 10, 1956, was engaged in the manufacture of furniture and bedding at its plant in Seattle (R. 15, 116, 287-288).

JOSEPH DILLON is a representative of the Western Conference of Teamsters (R. 127).

THE ENGLANDER COMPANY, INC., is a firm which is engaged in the manufacture of upholstered furniture and bedding in a number of states and up to January, 1956, had plants on the West Coast at Los Angeles and at Oakland (R. 12-14).

WILLIAM F. EVANS is the Executive Secretary of the Washington-Oregon District Council of Furniture Workers (R. 179).

THE FURNITURE WORKERS UNION, LOCAL 3197, is a labor organization affiliated with the Washington-Oregon District Council of Furniture Workers and with the Brotherhood of Carpenters, and which represented certain Craftmaster employees consisting of the mill-room workers, the carloaders and unloaders, the lumber handlers, and those working on the shipping and receiving floor and in the boiler room (R. 177-180).

AL GORD is the President of Local 6 of the Upholster-

ers Union but at the time in question was in charge of the affairs of Local 5 (R. 189, 201, 356).

RED HENRY was the shipping and receiving foreman for Craftmaster, and later for Englander (R. 131, 317).

ED HUNT was the factory manager for Craftmaster, was later in charge of the Englander office force, and after that became factory manager for Englander (R. 130, 131, 302, 316, 322).

CARL KISSICK is the business representative and financial secretary of the Furniture Workers Union, Local 3197 (R. 155, 182, 189, 270).

WILLIAM J. MOORE was the foreman of the upholstery and millroom departments for Craftmaster and also later for Englander, and in May, 1956, became the Englander plant superintendent (R. 131, 335).

CHESTER PINK is Englander's Vice-President in charge of manufacturing, with offices in Chicago, and Sparrowk's immediate superior (R. 303).

RALPH ROYER is the business agent of the Upholsters Union, Local No. 5 (R. 189, 197).

JOHN SPARROWK was at the time in question Englander's general manager of the western division, having his residence and headquarters at Oakland, and having supervision over the Los Angeles and Oakland plants, and later the Seattle plant. At the time of hearing his title had been changed to vice-president of the western region (R. 116, 285-287).

JOHN W. TRUMAN is an international representative of the Furniture Workers Union and assigned to Local 3197 of that union (R. 150, 151, 189).

UPHOLSTERERS UNION, LOCAL 5, affiliated with the Upholsterers International Union of North America, is a labor organization which represented Craftmaster employees consisting of the sewers, the upholsterers, and those in the mattress room (R. 197, 198).

THE WAREHOUSEMEN'S UNION, LOCAL 117, is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which local entered into a collective bargaining agreement with Englander as the exclusive bargaining agent for all production and maintenance employees, excluding certain categories not pertinent here. One of the Teamster locals (unidentified as to its number) represented the truck drivers formerly employed by Craftmaster (R. 117-118, 156, 323, 361).

W. L. WILLIAMS is the Secretary-Treasurer of Warehousemen's Union, Local No. 117 (R. 160).

D. The Facts

Prior to January, 1956, the Englander Company did not maintain a plant in Seattle. With the view to building a plant, John Sparrowk visited Seattle late in 1955, and there contacted a person with reference to acquiring some land, visited an architect, and received some quotations from a building contractor (R. 286-287). In December of 1955, Sparrowk learned of the possibility of acquiring the old plant of Craftmaster, Inc., and in that month came to Seattle to make a preliminary inspection of the premises. Negotiations for the acquisition of the Craftmaster plant continued until January 16, 1956, and were not concluded until the afternoon of

that date, with the signing of the lease and other documents. Englander purchased a portion of the Craftmaster inventory and equipment and entered into a lease with the owner of the premises, but did not assume any of Craftmaster's contractual obligations. The general counsel concedes that this is not a "successorship" situation (R. 116, 117, 123, 135, 286-289).

In the meantime, on January 10, 1956, Craftmaster had terminated the employment of its production force (R. 119). Up to that time there had been employed by Craftmaster approximately 35 members of the Furniture Workers Union, Local 3197, and approximately 71 members of the Upholsterers Union, Local 5 (R. 157, 178, 180, 192, 197, 206). There were also some truck drivers who were members of the Teamsters Union (R. 156, 323).

On January 11, 1956, five days prior to Englander's acquisition of the leasehold, the Furniture Workers Union sent a letter to Englander "To acquaint them with the fact that we had a labor agreement with the Craftmaster Company which contained a successor and assignee clause" (R. 193), and asking for a meeting to discuss the Union's position. That Union waited "a reasonable amount of time" until the following day, January 12, when its representatives conferred in Seattle and decided to establish a picket line, and its pickets appeared on January 13th (R. 181-183). Pickets of the Upholsterers Union appeared a day or two before. The picketing was a joint effort of both the Furniture Workers and Upholsterers Unions. At least in the early stages, the union officials did not know

whether they were picketing Craftmaster or Englander. In reality, they just picketed the building. The pickets were called off on or about February 13, and Englander commenced production on a substantial scale, on February 14th (R. 30, 120, 130, 132, 173, 175, 183, 196, 199, 207, 208, 296).

Englander had previously entered into collective bargaining agreements with locals of the Teamsters Union covering its plants in Oakland and Los Angeles (R. 125, 139, 140). In November, 1955, Sparrowk was told by Joseph Dillon, a representative of the Western Conference of Teamsters, at a time when Sparrowk was investigating a possible plant site in Seattle, that "we expect to have that plant on the same basis that we have your other plants" (R. 126-127). On January 9, 1956, Sparrowk met Dillon in Seattle and was then introduced to Mr. W. L. Williams, Secretary-Treasurer of Local 117 of the Warehousemen's Union. Sparrowk's testimony as to his discussion with Dillon is as follows:

"He introduced me to a Mr. Williams and indicated that inasmuch as they had contracts with us elsewhere and we had been doing business in Seattle and warehousing and it was handled by the Teamsters that they expected to have the representation in whatever undertaking we elected to do here." (R. 292)

As above stated, Craftmaster terminated its production force on January 10, 1956. At that time the plant foreman, William J. Moore, was still on the Craftmaster payroll, and he did not become employed by Englander until January 23 (R. 316, 335). Starting on January 11, the former Craftmaster employees returned

to the plant for the purpose of trying to ascertain what their prospects were concerning re-employment. Some of the former employees had telephoned Moore, some had been telephoned by him, some had been called to the plant by their own union, and some simply showed up at the plant without any prior contact (R. 337-339, 351). Sparrowk, of course, had been informed that there were three unions involved in the representation problem, being the Upholsterers, Furniture Workers, and Teamsters (R. 290, 291). On the morning of January 11, one of the former employees of Craftmaster told Sparrowk that there were some people assembled who would like to know if they were going to have a job. Sparrowk went to a little office on the second floor upholstery department and there visited with the people, who came into the office one or two at a time. Sparrowk explained to them that Englander would probably be in the business of manufacturing items comparable to what Craftmaster had been manufacturing, and that Englander had been told by the Teamsters Union it would expect to be recognized in the Seattle plant since it had contracts with Englander in other plants (R. 293-4). By reason of the demand or request for recognition by the Teamsters, Sparrowk suggested that the job applicants see Mr. Williams of Local 117 to find out "what they had to offer" (R. 294). After Sparrowk had talked to a few of the applicants he was asked where Williams' office was. Sparrowk sent for a telephone book to ascertain the address (R. 295). In at least one case Sparrowk wrote Williams' address on a slip of paper (GC Ex. 11, 370), but this was furnished at the request of the job applicant himself (R. 246).

On the morning of January 16, 1956, from 75 to 80 people were gathered in a group inside the plant. Sparrowk addressed this group as follows (R. 133-135):

“Q. Very well. Now will you tell us, please, what you did tell the employees when you addressed this group of 80?

A. I told them that we were told by the Warehousemen's union that they would have this plant inasmuch as they have Englander factories elsewhere in the country and that evidence outside tells us that there is disagreement with that; that as far as I was personally concerned I did not want us, that is, the Englander Company, to have any problems with any union, whether it was the Teamsters, the Furniture, or Upholsterers Union. I would like to tell you to come to work because I know you have been off of work a great bit since Thanksgiving but that is something I cannot tell you, as it has to resolve itself, and we are not going to start out with problems with any union. A lot of people came to me individually and said I could do so and so and so; I indicated to them my feeling, that unfortunately they were in a bind. They wanted to come to work and we wanted to start this operation, but we had this problem, that until it was resolved I didn't know what I could do.

Q. Did you not disclose to the assembled employees that you had heard of this agreement being made in the East?

A. I heard that—I had had rumors of all kinds of things taking place, but I did not specifically indicate, to my recollection, that somebody said go ahead and do something. I wasn't satisfied enough to open the plant, let's put it that way.

TRIAL EXAMINER: Satisfied with what?

THE WITNESS: With the fact that anybody had the membership sufficient that I could open the plant and recognize them as being a representative of the employees.

TRIAL EXAMINER: Did you say anything about that to the people who were assembled there?

THE WITNESS: I indicated to them—

TRIAL EXAMINER: Tell us what you said, please.

THE WITNESS: I said to them that we are told by three different unions that they are to have representation in this plant. We are told by one that arrangement has been made with an International of another that they could or should have jurisdiction here. Frankly, I am not convinced that they know what they are talking about. That was my statement to them.

Q. (By MR. BOYD): At the conclusion of that meeting what action did you take to inform them of what to do or what they might expect?

A. Well, my closing statement, frankly, was one that was sort of an afterthought, after I got ready to go back in the office—I had worked my way towards the door—was to the effect that this is rather strange, anyway, because actually we haven't bought anything yet, that I have an appointment to go with some other people to the bank to acquire something, so we might be in business; if that didn't work out, why, all the problems we were anticipating weren't going to be in existence . . .

Q. When did you sign the papers?

A. We signed it on the 16th.

Q. How long after that meeting?

A. I think our appointment was 1:00 o'clock.”
One witness described this group at the meeting of

January 16 as comprising approximately 90% of the former Craftmaster employees (R. 348). Another witness (Testerman) testified that Sparrowk told the group that this "master agreement" (referred to in the Complaint as a "national agreement") with the Teamsters, would cover the Seattle plant too (R. 223, 224). Testerman, as well as two other witnesses (Granger and Bale) likewise testified that on January 11 they had been told by Sparrowk that clearance by or membership in Local 117 was a condition of employment (R. 221, 212, 214, 245). The Board, however, specifically found (R. 40-43) that such testimony was not credible and that Sparrowk's actual statement to the employees on January 16 was simply that Englander had been told by the Warehousemens Union it would have the Seattle plant inasmuch as the Teamsters had Englander factories elsewhere in the country. There is no finding by the Board that Sparrowk told any employee that clearance by or membership in the Warehousemens Union was a condition of employment, or that Englander was bound to that union under some "master agreement."

On February 6, 1956, Truman and Kissick (representatives of the Furniture Workers) met with Williams at Local 117's office. Williams informed them that some working agreement had been reached between the Upholsterers International and the Teamsters International Unions, under which the upholsterers would retain their membership rights in Local 5, but would become members of the Teamsters. Williams offered to let the Furniture Workers Union retain its jurisdiction in the millroom and then survey the plant for the

purpose of ascertaining jurisdiction over the remaining jobs as between the Warehousemen's Union and the Furniture Workers Union. Truman replied that he had thus far not been notified of any such agreement between the Internationals and that until such time as the Warehousemen and Upholsterers had settled their differences and he had been so notified by the Upholsterers, there was very little to talk about (R. 160, 161, 277).

Ralph Royer, business agent of Upholsterers Local 5, called a special membership meeting on February 13. This was attended by Al Gord, and Williams was also invited to attend (R. 201). Local 5 had received a telegram from the President of the Upholsterers International Union. As a result of the telegram the membership was instructed by Gord to go to work under the "Teamsters' agreement," but still remain members of Local 5. The "pact" between the two Internationals had apparently been in existence for some time, and it had been Royer's impression that the jurisdictional controversy would be settled at the International level (R. 190, 201, 205). Previously, Williams had addressed the Upholsterers at this meeting and informed them of the Teamster insurance and pension plans and that the Teamsters had contracts with Englander in California (R. 204). The Upholsterers voted to send its members to work under the "Teamsters' agreement" (R. 205). Later that afternoon the upholsterers met at the Teamster Hall, at which time Williams read to them from a form of the contract that the Teamsters had up and down the Coast, and in other plants. Pamphlets and booklets explaining the benefits of the Health & Welfare and Pension Plans were distributed (R. 205, 206,

355). At both the earlier and later meetings 65 out of the former 71 Craftmaster employees in the Upholsterer category were in attendance. Applications for membership in the Teamsters were then taken. Upholsterers' union pickets withdrew around that time (R. 206-8). One witness described the termination of the picketing as follows (R. 355):

“Q. In the meantime had there been pickets from the Upholsterers at the plant, that is, up until about that time?

A. Yes, sir, until such time as the Upholsterers Union was directed by the Upholsterers International Union in Philadelphia that we have a working agreement with the Teamsters and thereby we had to abide by it, and any and all charges that were prepared, unfair labor charges, were to be—I am searching for a word, I can't find it—were to be—

Q. Until the differences were resolved?

A. Right.”

On February 14, 1956 (R. 175) the Furniture Workers Union held a meeting at the Labor Temple. At this meeting Truman, Kissick, and Evans were in attendance, as well as a majority of the former Craftmaster employees who were members of that union (R. 275). At one point in his testimony Truman admittedly told the membership to join Local 117 (R. 173), but at another point stated that he told them simply to apply for jobs and that if that meant signing up with the Teamsters, to go ahead and do it (R. 168-9). Kissick and Evans testified that they instructed the people to clear with or join the Teamsters only if that was necessary to return to work (R. 274, 278,

191-2). The only former Craftmaster employees who testified on the subject stated that they were definitely instructed by their union officials to become members of the Teamsters Union and that they had no intention of joining until they were so instructed. These witnesses were Mertel (R. 328-9), Bale (R. 247-9), Griffin (R. 254), and Rober (R. 267-70). It is not necessary to resolve this conflict, however, because the Board specifically pointed out that it based no finding that respondent had engaged in unfair labor practices upon what was said at the union meetings (R. 29). In any event, Truman instructed the withdrawal of the pickets on February 14 (R. 168, 175).

On the afternoon of February 13th, Williams notified Sparrowk by telephone that a majority of the potential labor force had been signed up by Local 117. Sparrowk insisted upon proof and he then went to Williams' office and counted in excess of 60 application forms (R. 310, 314). Williams later notified Sparrowk that he had an additional 20-odd applications and at about 11:00 A.M., on February 15, Sparrowk inspected G. C. Ex. 9 (R. 366-7) and found that the first page was fully completed and was reasonably certain that the second page was fully completed (R. 325-6). (It should be pointed out that 90 names are listed on the two pages in the printed record, whereas the photostatic copy in the possession of this respondent shows 87 names on the first two pages and three names on the third page. The trial examiner found the number to be "some 87" (R 35)).

Substantial production commenced at the Englander plant on February 14, when 60 employees were

hired. An additional 18 employees were hired on February 15 and 4 more on February 16, bringing the total number of non-supervisory employees to 96 (R. 30).

The collective bargaining agreement between respondent Englander and respondent Union is G. C. Ex. 2 (R. 361-365). On February 6, 1956, Sparrowk spoke on the telephone to Chester Pink, Englander's vice-president in charge of manufacturing, with offices in Chicago. Pink told Sparrowk at that time that he had in the Chicago office this document which had been signed by Dillon and Williams on behalf of the Union (R. 138, 142). Pink told Sparrowk that the document would be forwarded to him but instructed him "that when somebody had the majority that we could enter into a contract, but until every union indicated that to us, and until I was convinced that one had the majority I was to not sign" (R. 141). Following the withdrawal of the pickets and resumption of operation, on February 15 or 16, Sparrowk returned to his Oakland office and then signed the contract on behalf of respondent Englander. Up to that time there had been no signatures to the document on behalf of Englander, although its general labor counsel did sign it subsequently (R. 141, 142, 284, 365).

ARGUMENT

A. Fundamental Principles

Certain fundamental principles must be applied in this case:

First, the Board's findings of fact are conclusive only if supported by substantial evidence on the record con-

sidered as a whole. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.ed. 456 (1951).

Second, hearsay is not substantial evidence, cannot furnish the "background" for the drawing of inferences, and will not support a finding of fact by the Board. *N.L.R.B. v. Washington Dehydrated Foods Co.*, (CA-9, 1941) 118 F.(2d) 980; *N.L.R.B. v. Haddock Engineers, Ltd.*, (CA-9, 1954) 215 F.(2d) 734; *Superior Engraving Company v. N.L.R.B.* (CA-7, 1950) 183 F.(2d) 783; *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197, 83 L.ed. 126 (1938); *N.L.R.B. v. Amalgamated Meat Cutters* (CA-9, 1953) 202 F.(2d) 671.

Third, the Board is entitled to draw inferences from the evidence, but such inferences must be reasonable. If the Board could just as reasonably infer a proper motive as an improper one from a course of conduct, there is no substantial evidence of an unfair labor practice. *N.L.R.B. v. Houston Chronicle*, (CA-5, 1954) 211 F.(2d) 848.

Fourth, the First Amendment of the United States Constitution generally, and Section 8(c) of the Act specifically, guarantees to an employer the right of free expression of views, argument, or opinion. The employer and his agents are entitled to express a preference for one union over another, and even to encourage membership in one union rather than another, provided such expressions contain no threat of reprisal or force or promise of benefit. *N.L.R.B. v. Corning Glass Works* (CA-1, 1953) 204 F.(2d) 422, 35 A.L.R. (2d) 408; *Wayside Press, Inc., v. N.L.R.B.* (CA-9,

1953) 206 F.(2d) 862; *South Tacoma Motor Company v. N.L.R.B.* (CA-9, 1953) 207 F.(2d) 184; *N.L.R.B. v. O'Keefe* (CA-9, 1949) 178 F.(2d) 445; *Stewart-Warner Corporation* (1953) 102 N.L.R.B. 130.

Fifth, whether or not conduct is unlawful must be determined from an inspection of the whole fabric of the case. Isolated and remote statements of agents, even if attributable to their principals, will not support an unfair labor charge. *E. I. DuPont de Nemours Co.* (1953) 105 N.L.R.B. 104; *N.L.R.B. v. Armour & Co.* (CA-5) 213 F.(2d) 625; *N.L.R.B. v. Mississippi Pdcts., Inc.* (CA-5, 1954) 213 F.(2d) 670; *N.L.R.B. v. Shenandoah* (CA-10, 1944) 145 F.(2d) 542; *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556; *N.L.R.B. v. Hart* (CA-4, 1951) 190 F.(2d) 964.

B. Preliminary Argument

As above mentioned, certain important allegations of the Board's complaint were found by the Board to be not supported by the evidence. The trial examiner's intermediate report and the Board order take up a total of eighty-six pages of this printed record (R. 9-79, 86-100). These documents make rather difficult reading, and some of the reasoning contained therein is even more difficult to understand. For example, at one point the examiner found that the agreement between Englander and Local 117 was in effect "as early as February 10," on the basis of testimony by Testerman that Bombardier (a Teamster representative) had told her on that date that "they had a contract" at the plant (R. 57-58). Obviously, since both respondents were charged with having entered into the contract prema-

turely and since the existence of a contract necessitated the assent of both parties, that finding must inferentially have applied to both respondents. Still, the examiner was quick to point out (R. 59) that "Needless to say . . . Bombardier's statement to Testerman . . . [is] not binding upon Englander and cannot be taken as evidence against it," for the obvious reason that it was hearsay. Later, the examiner found (R. 61) "that the agreement under consideration was entered into at some point prior to Hunt's statement on February 13." Still later (R. 88), the Board found that the contract was entered into "prior to February 14, 1956." The complaint, it will be recalled, charges that the contract was entered into "on or about January 16, 1956." In its brief (p. 18), the Board goes even further and states:

"Thus, even before the lease was executed on January 16, the question of representation at the Seattle plant had been pre-determined by the established relationship between Englander and the Teamsters elsewhere."

The reasoning of the examiner and Board is based upon a pyramiding of inference upon inference. From the fact that the contract was entered into prematurely it is inferred that Sparrowk showed an improper preference for the Teamsters (R. 45-47). From the fact that he showed an improper preference for the Teamsters it is inferred that the contract must have been entered into prematurely (R. 60, 61, 89).

Added to all this, of course, is the fact that Sparrowk's "referring" of the job applicants on January 11 (R. 43) occurred five days before Englander was in

business in Seattle, and also five days before the date on which the contract is even alleged to have been executed (R. 5). How, then, could the contract possibly have a bearing on the legality of Sparrowk's actions? If the Board is referring not to an executed contract but merely to a preliminary understanding that at some future date the parties might reach an agreement (not on the record), that can not justify enforcement of the order, for in *Jules Resnick, Inc.* (1949), 86 N.L.R.B. 10, the Board stated:

“... Furthermore, while there are indications that the respondent and the Independent may have agreed to the terms of their contract before the Independent had organized the respondent's employees, and the respondent did in fact act precipitately in signing the contract in face of A. F. of L. objections and charges, *the respondent's action did not constitute a violation of the Act, because the Independent represented a majority of the respondent's employees when the contract was executed on March 3, 1948.*” (Emphasis added)

C. The Premature Contract

The Board, on pages 88-90 of this record, summarizes the “evidence” upon which it based its finding that respondents entered into the contract “prior to February 14, 1956.” A mere recital of this “evidence” is its own refutation. The points mentioned by the Board are discussed below in the same order.

(a) *In 1955 and again in January, 1956, Dillon told Sparrowk that the Teamsters expect to have the Seattle operation.* This testimony could just as well have supported a conclusion that Englander was under contract

with the Furniture Workers and Upholsterers Unions, for they likewise “expected” to “have” the plant and picketed with that view in mind. Certainly, a contract contemplates the assent of at least two parties, and the expectation of one that he will at some future date secure the assent of the other if and when the other engages in business falls far short of establishing either the existence of an actual contract or an understanding that there ever will be one.

(b) *At a plant meeting on February 13, 1956, factory manager Hunt stated that Williams had the right to ask job applicants to come to the plant since the Teamsters had an agreement with Englander. This point merits fuller discussion.*

At this meeting the Furniture Workers Union was represented by Truman and Evans (R. 165, 184). Williams was there as a representative of Local 117 and likewise Sparrowk and Hunt (R. 165). The record is silent as to why Hunt was there, and it is possible that he just happened to be sitting in the office with Sparrowk at the time. At any rate, there is absolutely no evidence that he was called into the office for the purpose of meeting with the union officials. Sparrowk testified that he “substantiated the fact” that he was in the room until after the union officials left, and denies that Hunt made a statement about Williams doing the hiring for the plant (R. 302). For reasons which appear below, it is unnecessary to resolve this conflict in testimony.

Hunt had the payroll title of Factory Manager for both Craftmaster and Englander (R. 130-1). Hunt came on the Englander payroll on February 1 (R. 302), *but*

for a considerable period thereafter his duties involved the winding up of Craftmaster's affairs and he had no supervisory authority over any employees other than office personnel (R. 322). There is no evidence, nor any inference which could possibly be drawn therefrom, that Hunt's activities or responsibilities related to production or maintenance employees at the time of the February 13 meeting. Sparrowk himself did the screening and hiring up to February 14, with the exception of one casual clean-up man who had been hired by Moore through an employment agency (R. 322, 323, 336). Furthermore, there was no *apparent* authority lodged in Hunt to speak on behalf of Englander with respect to maintenance and production personnel, notwithstanding the fact that the trial examiner (R. 59) stated that: "one may assume from the fact that he has the title of factory manager that he occupies a position of substantial importance in the supervisory hierarchy at the plant." At that point, *prior to the commencement of production*, respondent submits that no one had the right to "assume" that the payroll title of factory manager carried with it any authority to speak on behalf of the employer, particularly where the evidence conclusively shows that no one was misled by the title. Evans himself testified (R. 194-5) that he looked to Sparrowk (not Hunt) as Englander's representative in this matter and that, at least at that time, he did not know what authority, if any, Hunt had with reference to labor negotiations on behalf of Englander. It should be noted that, aside from Sparrowk's denial that Hunt made the statement attributed to him, Truman was not sure whether Sparrowk was still in the room at the time (R.

172), and Evans, while not sure, thinks that Sparrowk had already left the room (R. 187-8).

Respondent moved to strike, on the ground that it was hearsay, made without authority, and accordingly not binding on Englander, the testimony concerning the alleged statement of Hunt (R. 195). The motion was denied and the testimony forms the prime basis for the Board's finding that, so far as this respondent was concerned, the contract was entered into prematurely.

Furthermore, Truman himself testified that at this meeting he was informed by Sparrowk that *Englander* was doing the hiring and *not* Williams (R. 172), although at a later point (R. 176) he was somewhat rehabilitated on re-direct examination by the general counsel to the extent that Williams' name was omitted (R. 176). What is equally important, is that up until the very time of that meeting both Sparrowk and Truman had stated to each other their mutual feelings that they might be able to do business together (R. 165, 302). It is inconceivable that Hunt's statement, if made, could in any way mislead the Furniture Workers' representatives (either as to Hunt's authority to speak or as to the existence of a commitment to the Teamsters), or that the statement could be given evidentiary value to establish the actual existence of the contract, where the top company representative on the scene and the union officials both felt that they could get along and the company representative further asserted a position concerning hiring which was utterly inconsistent with that allegedly voiced by Hunt.

Hunt's statement was not binding on this respondent

because it was made without any authority, real or apparent. *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556.

Admissions of an agent are not competent unless within the scope of his authority and are statements of fact and not opinion. 31 C.J.S., Evidence, Sec. 354, p. 1128.

Even if this court should "assume," as did the Board, that Hunt had authority to speak simply by reason of his payroll title of factory manager, the statement is still not evidence because it contains conclusions and opinions rather than facts. It should be remembered that the statement was not to the effect that Hunt had *seen* a signed contract, or that he had *heard* Sparrowk and Williams agree to something. He assertedly simply concluded that the Teamsters held "an agreement" and that in his opinion certain rights arose therefrom. Courts and lawyers frequently have difficulty in determining those matters, and Hunt certainly was not qualified to express the views of an expert, particularly in the absence of any showing of the *factual* foundation therefor.

Statements or admissions relating to questions of law or constituting legal conclusions are not admissible. A statement as to whether a contract was made or what the contract means expresses a legal conclusion. Testimony as to the opinion of a person not a witness in the case is inadmissible, particularly where such person is unqualified to express an opinion. 31 C.J.S., Evidence, sec. 272, p. 1025 *et seq.*; 32 C.J.S., Evidence, Secs. 452 and 453, p. 90, *et seq.*; *A. E. Staley v. N.L.R.B.* (CA-7, 1940) 117 F.(2d) 868.

Hunt's statement, *if made, if within the scope of his apparent or real authority, and if otherwise of evidentiary value, still cannot form a foundation for a finding adverse to this respondent for the reason that it was isolated and contrary to the views expressed by Sparrowk himself to both Evans and Truman and to 75 or 80 workers assembled at the plant on January 16, all of which views were utterly inconsistent and incompatible with a prior commitment to the Teamsters.*

(c) *On February 6, 1956, Sarrowk was told by Pink over the telephone that the latter had in his possession a "contract" signed by respondent union. Respondent admits this was true, except that it denies that a document signed by only one of the parties becomes a "contract." In its then existing form, the paper constituted nothing more than an offer to contract and the evidence is uncontroverted that such offer was not accepted until Sparrowk's signature was placed thereon, on February 15 or 16.*

(d) *On January 26 Sparrowk told Truman that Englander had a "master agreement" of nation-wide scope with the Teamsters and feared reprisals at the Seattle plant if he entered into a contract with another union; and on February 3 Sparrowk refused Truman's request for a consent election, ascribing the "master agreement" as the reason for such refusal.*

In the first place, Englander is not charged with refusing to bargain and Sparrowk's fear against signing with another union is not a violation in this case. Likewise, his alleged fear of reprisals will not support any charge, for he was not threatening reprisal against *Truman* but simply allegedly expressing an opinion as to

what might happen to *Englander*. Likewise, Sparrowk's alleged refusal to consent to an election is not charged, nor could it be, as a violation. The crux of this point is the "master agreement."

Sparrowk's purported statements to Truman concerning the "master agreement," were taken by the Board (R. 60, 61, 89, 90) as evidence that such a nationwide agreement actually existed. The Board also took the statement (R. 38) as evidence of an improper motive on Sparrowk's part in referring the applicants to the Teamsters. If in truth and in fact such a nationwide "master agreement" did not exist, then even if Sparrowk had made such a statement it should not justify the conclusion reached by the Board. The mere making of the statement might have a bearing on Sparrowk's motivation for making the "referrals" (if such motivation is a material factor), but that subject will be discussed below.

At the outset, it should be mentioned that the general counsel conceded that this was not a "master agreement," but rather a "pattern form" (R. 140). The Board was unable to find, despite some testimony to the contrary, that any of the 75 to 80 employees assembled at the plant on January 16 were told by Sparrowk when he addressed them, that there was a "master agreement" binding *Englander* to the Teamsters with respect to the Seattle plant. Rather, the Board found (R. 12) that he told the people simply that the Teamsters had informed him "that they would have this plan (in Seattle) inasmuch as they have *Englander* factories elsewhere in the country . . . " The Board specifically

found, in other words, that Sparrowk was simply repeating a prediction by the Teamsters that they would be successful in getting representation rights. It will be remembered that in Paragraph VI of the Complaint (R. 6) Englander is charged with having told the workers of the "national agreement" as early as January 11, 1956. There is no finding that he did so then, nor on January 16, nor at any other time, nor has any such agreement been produced in evidence, orally or in writing. If, however, such an agreement did exist or if Truman had been led by Sparrowk to believe it to exist, that would be utterly inconsistent with testimony of the representatives of the Furniture Workers and Upholsterers Union themselves.

Ralph Royer, the Upholsterers' Business Agent, testified that he met with Williams on the afternoon of February 13, and had read to him "a contract that they have up and down the Coast and to other plants, he read that to the members." This "contract" was not signed, but was simply a contract form (R. 205-6). Truman himself testified that on Jan. 26 (R. 179) Sparrowk had assured him that if the Furniture Workers Union represented the people who worked in the mill-room he would recommend to his superiors that such union be recognized. Kissick testified (R. 277-280) that at least until Feb. 6 the question of representation was a wide-open matter. Truman stated on Feb. 13 that he felt up to that date that it looked like Englander and the Furniture Workers were going to be able to do business together (R. 302). What is most significant is the following testimony of Truman (R. 170):

“Q. Now, Mr. Truman, there was reference made to a Warehousemen or Teamster agreement or agreements. Now, which was it, plural or singular, if you recall?”

A. As I recall, it was both . . .

Q. But you would not dispute it if Mr. Englander would tell you that there were several covering the several plants?

A. I would neither refute it nor admit it, sir, because I can't remember.”

Truman and the other union officials concerned, as well as their union members, were led to believe and did actually believe that Englander was not bound to the Teamsters under a single nation-wide agreement, but instead, had “agreements” with the Teamsters at some of the Englander plants. The Board did not consider this evidence in its whole context, but seized upon isolated portions in order to arrive at its adverse findings.

(e) *On February 10, 1956, Bombardier told Testerman that “they had a contract at the plant.”* This testimony was objected to by respondent on the ground that it was hearsay and not made in Englander's presence. The examiner ruled: “Well, I will take it as to the union” (R. 226-7). In his intermediate report the trial examiner ruled that the testimony could not be used against this respondent (R. 59). Being hearsay, the testimony may not be considered, at least as far as this respondent is concerned.

(f) *The document signed around Feb. 13, 1956 (GC Ex. 9, 366, 367), indicates that the applicants therein accept “all working conditions contained in the contract in effect between the International Brotherhood*

of Teamsters and the Englander Company . . .” This, of course, is likewise hearsay as to Englander, since it was prepared and signed by persons other than its representatives. The trial examiner likewise observed (R. 59) that the document was not binding against this respondent.

(g) *The absence of any evidence of prior negotiations, together with the fact that the contract is little more than a duplicate of the Los Angeles contract.* Respondent concedes that there is little or no evidence in the record as to the negotiations leading up to this contract. It is true that Sparrowk did not know about any negotiations, but if that is a critical fact, was not the burden on the Board to produce evidence that none took place? The other signators were just as available to the Board as witnesses as to the respondents. Considering that the agreement as proposed by the Teamsters was first submitted to Chicago after being signed by Dillon and Williams, persons other than Sparrowk could possibly have shed some light on this subject had the Board deemed it of any consequence.

Furthermore, the evidence shows that except for matters pertaining to pension payments (whether by the week or by the hour), the absence of a wage schedule, and a provision for observance of Washington’s birthday (a legal holiday in the State of Washington, RCW 1.16.050), the Seattle contract was patterned after the Los Angeles contract (R. 307-309). With regard to wages, Sparrowk had assured the applicants that they would be paid much the same as in the past while working for Craftmaster (R. 350). The contract is admit-

ed by the general counsel to be a "pattern form" (R. 140). Sparrowk himself was present at some negotiations leading up to the Los Angeles contract (R. 306), and therefore it was only necessary for him to verify that it followed the same pattern except for the parts that were written in (R. 308). In any event, Sparrowk's big problem at that time was not necessarily the terms of a contract, but rather whether it should be signed with the Teamsters or with the Upholsterers and Woodworkers. This was a jurisdictional dispute. It took better than a month for this controversy to be resolved and he signed with the former union when he was satisfied that it had the majority. It is not an uncommon practice for parties who have had prior dealings together to utilize legal forms which are familiar to them. Lawyers frequently borrow forms from other lawyers and adapt them to a given situation. Why, then, should the Board draw an improper inference from this action on the part of respondent when a lawful and proper inference could more reasonably be drawn? Added to this is the fact that the Furniture Workers Union and the Upholsterers Union, in their prior dealings with Craftmaster, had themselves furnished the pattern for the wage schedule. In any event, does the absence of evidence as to the extent of prior negotiations justify the Board in concluding that the agreement must have been executed on January 16, or February 10 or February 13?

No contract, oral or written, was entered into between Englander and the Teamsters at any time prior to February 15, and the Board's findings to the contrary must be set aside.

D. Sparrowk's "Referrals" to the Teamsters

The "impact" of Sparrowk's conduct upon the job applicants is discussed by the trial examiner on page 49 of the record and by the Board on pages 13 and 14 of its brief. The trial examiner mentioned that "various job applicants did not take Sparrowk's advice, but instead reported it to their own unions." That is quite an under-statement. *The fact of the matter is that out of 126 former Craftmaster employees the record discloses only two who joined Local 117 prior to being instructed to do so by the Furniture Workers or Upholsterers Union.* One of these persons was Walters. He could not possibly have been misled into believing that Englander was bound to the Teamsters, for at the Teamsters Hall, Williams explained to him the Teamster pension plan that they *hoped* to get from Englander (R. 342). The other person was Harstad, *and he joined the Teamsters while still on the Craftmaster payroll* (R. 359-360). Other employees testified flatly that they neither joined nor intended to join the Teamsters until told to do so by their own unions. These employees were Mertel (R. 328), Griffin (R. 252), Bale (R. 248-9), and Rober (R. 268-9). The "impact" of Englander's allegedly unlawful conduct was slight indeed.

Sparrowk's "referrals" were hardly made "gratuitously." A jurisdictional battle was shaping up. The plant was shut down and former Craftmaster employees came to him and asked what they were to do (R. 293). Some had been sent to the plant by their own union officials (R. 351). Some were contacted by Moore and some came in without any prior contact (R. 339). On

Jan. 11 Sparrowk talked to 15 or 20 people. Apparently all asked the same questions, for he decided he should have a phonograph record made" (R. 122). Some of them asked him where Williams' office was and he furnished the address after getting a telephone book (R. 295). While, as observed by the trial examiner (R. 4-5), one of the interviewees did not himself ask for the address, Sparrowk was definitely asked for the address after the first few interviews (R. 295). Bale specifically requested that Sparrowk give him the address in writing (R. 246).

The trial examiner makes much of Sparrowk's real motivation" and "purpose" in suggesting that the job applicants see Williams. If a subjective test is to be applied, was it not reasonable and proper for Sparrowk to make those suggestions, in view of demands or "expectations" by the Teamsters for recognition which he knew were going to conflict with the demands of the other unions? The Board's argument on this point, commencing on page 13 of its brief, is devoted very little to what Sparrowk actually said, but very extensively to why he said it. Respondent contends that Sparrowk's motivation was most legitimate, considering that he was simply trying to resolve a jurisdictional dispute so that he could get the plant in operation, and toward that end simply told the applicants who one of the disputants was so that they could investigate for themselves. Regardless of that, respondent maintains that his "referrals" or "invitations" did not constitute unlawful conduct and that much stronger assertions have been held by this court and others to be within the

protection of the First Amendment and Section 8(c) of the Act.

In *N.L.R.B. v. Corning Glass Works* (C.A.-1, 1953) 204 F.(2d) 422, 35 A.L.R.(2d) 408, a far stronger case of violation was presented against the employer, but enforcement of the Board's order was denied. The question there involved was the Board's alleged preference of an A.F. of L. Union over a C.I.O. Union. The court stated:

“ . . . Several rank-and-file workers, both men and women, with their supervisors' permission, left their machines to substitutes selected by their supervisors and circulated freely and openly throughout the plant on the respondent's time distributing AFL cards and soliciting membership in that Union from other workers both while the latter were at the machines, as well as during the rest periods. And two or three of the respondent's supervisors verbally encouraged the solicitors in their work, inquired as to the progress of the campaign, and expressed satisfaction with the results being achieved, voicing preference for AFL over CIO, not only to the solicitors but also to other workers in the plant, saying in substance that it would be 'advisable' to sign AFL cards, and that they did not want CIO in the plant.”

The court then went on to hold:

“The Board's position is not altogether clear. First it said that 'strict neutrality' is the rule for an employer to follow when rival unions are attempting to organize its employees. Then it backs away from its broad generalization by conceding that under some circumstances an employer may express a preference, but follows this by a finding

that the respondent through some of its supervisors, had overstepped the bounds and committed an unfair labor practice by indulging in 'action to aid' AFL, which it apparently considered a violation of Section 8(a)(2), and by exerting 'verbal pressure' on its employees, which it obviously considered a violation of Section 8(a)(1).

" . . . But to constitute such support, we think there would have to be some non-privileged discrimination against the second union, and there is no evidence of that in this case."

It is important to note that there is no evidence of an anti-union background on the part of the employer in this case, and no evidence that the Upholsterers and Furniture Workers Unions were not afforded equal opportunity with the Teamsters to organize the job applicants. *N.L.R.B. v. Corning Glass Works, supra*.

In *Wayside Press, Inc., v. N.L.R.B.* (C.A.-9, 1953) 206 F.(2d) 862, the employer petitioned to set aside the Board order based upon a charge that it was favoring the Independent union over the Pressmen's Local No. 78. A part-time foreman, Stevens, was asked by an employee for his opinion on the advisability of reactivating the Independent. Stevens replied that "it would be a little bit in our favor if we did have it that way." There was other evidence of alleged assistance to the Independent by Stevens and other foremen, who were assumed by the court to be "supervisory employees," for the purpose of the decision. In denying enforcement, the court held:

" . . . In any event, it is no violation of the Act that the employees knew that the employer pre-

ferred an independent union or that Foreman Stevens preferred to be a member of it . . .

“We think that the evidence adduced failed to support the Board’s findings. There is no showing of any record of hostility toward the outside union . . . or of active solicitation by supervisors, or some other pointed indication of the employer’s anti-union sentiment, such as can be found in other cases where disestablishment orders which are based upon acts of supervisory officials have been enforced . . .

“ . . . Wayside is a small plant, employing some sixty persons. To attempt, as the Board has done, to apply the same standards to such a plan as are applied to plants employing hundreds of persons with full-time supervisory employees is to ignore reality.”

In *South Tacoma Motor Company v. N.L.R.B.* (CA-9, 1953) 207 F.(2d) 184, there was a petition by the employer to set aside an order based on violations of Section 8(a)(1) and 8(a)(3). The employer was under contract with the Retail Clerks, and was charged, among other things, with favoring that union over the Teamsters, and that it discharged a salesman who was thought to favor the Teamsters. The court denied enforcement:

“There is no evidence of anti-union background in petitioner’s history. The circumstances that management praised the terms of the present contract and that it favored Retail Clerks over Teamsters is not a violation of the statute . . . ; ‘acquiescence’ or ‘approval’ are not what the Act contemplates when it uses strong words such as ‘in-

terfere,' 'restrain,' 'coerce,' and 'dominate' in Section 8(a)(1) and (2)."

In *N.L.R.B. v. O'Keefe* (CA-9, 1949) 178 F.(2d) 445, the president of the employer corporation had frankly stated that management preferred no union at all, but preferred the A.F.L. to the C.I.O., as the lesser of two evils. The Board found that his speeches *per se* were violations. To support this conclusion the Board cited a number of cases decided under the National Labor Relations Act prior to modification by the Labor Management Relations Act of 1947, 29 U.S.C.A., Sections 41-197. The president of the corporation had said that he felt all unions were evils; that the "question for you to decide is which of the two . . . evils is the lesser." He expressed a preference for the A.F. of L. over the C.I.O. The court stated:

" . . . But we do not find in anything he said any coercion or threat of reprisal. Neither did the employees, for in spite of the president's speech, the C.I.O. won the election by a substantial majority. . . . We realize that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance. Even so, we do not find in the words used here anything which can be construed as coercive. That being so, it is our responsibility to say, as we do, that the finding of coercion through the speeches is not based upon substantial evidence. Therefore, enforcement of that portion of the order enjoining violation of which there is no substantial evidence will be refused."

The determination of whether language used by an employer is unlawful is a question of law ascertain-

able from a consideration of the language itself. *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556. An employer's statement cannot be used as background material for the finding of an unfair labor practice where such statement falls short of restraint or coercion. Hasty recognition of one of two rival unions is not background evidence of unlawful assistance. *Coppus Eng. Corp. v. N.L.R.B.* (CA-1, 1957) 240 F.(2d) 564.

E. Griffin and McDonald

It will be recalled that in Paragraph VI of the Complaint (R. 6) Sparrowk and his subordinates were charged with having told job applicants of the "national agreement" containing a union security clause; and also having instructed "*each applicant*" to "go to the offices of Respondent Teamsters to comply with such conditions precedent to hire which said Respondent Teamsters imposed." The last portion of that charge has apparently been abandoned entirely, for there is no evidence or finding that Englander or any of its representatives told any employee to comply with Teamster instructions. The first portion of the charge has apparently been abandoned as to Sparrowk, for he was found not to have made such statement to any employee. This brings up the question of whether his subordinates acted improperly and leads to a discussion of the cases of Griffin and McDonald.

The Board found (R. 52) that certain statements made by Sparrowk's subordinates to these two people constituted coercion, unlawful support and discrimina-

tion in violation of the first three subdivisions of Sec. 8(a).

Adverse findings with respect to Griffin and McDonald were made on the basis of their own unsupported testimony. Moore denied that he made the statements attributed to him (R. 337). Sparrowk did *not* instruct him to impose any conditions of union membership in his dealings with the workers, but simply told him that Englander had been approached by the Teamsters relative to their membership (R. 338). The trial examiner resolved the conflict in testimony against this respondent for two reasons: First, because Griffin and McDonald gave "circumstantially detailed accounts" of their discussions, while Moore's denial was a "blanket" one; second, because the premature execution of the contract lends plausibility to their testimony (R. 50-52). This type of circuituous reasoning pervades the examiner's report and Board order: Because the contract was entered into prematurely, Englander was predisposed toward the Teamsters; because Englander was predisposed toward the Teamsters, the contract must have been entered into prematurely (R. 59-61).

Respondent will not ask this court to resolve substantial conflicts in the testimony, but does submit that it was improper to draw adverse inferences in such a case simply because two out of 126 possible job applicants gave "detailed accounts" of their conversations with Moore, and Moore's denial was general in nature. Indeed, Moore's testimony would truly have been suspect had he undertaken to give detailed accounts of the many conversations he had with 126 possible job applicants lasting over a period of one month.

Mrs. Griffin could not possibly have been misled or coerced by what Moore told her, for he made it very clear that the jurisdictional dispute was still unresolved. By her own testimony Moore told her in that very same conversation: "Well, it isn't settled yet one way or the other" (R. 252). Her further testimony is as follows:

"Q. (By MR. MARGOLIS): Mrs. Griffin, during your conversation with Bill Moore on Feb. 13 [14] he gave you to understand that there had been and was still in existence some controversy between Local 3197 and Local 117, correct?

A. Yes.

Q. The controversy involving which union would have jurisdiction over the people in the plant, correct?

A. Yes.

Q. And he told you at that time that the controversy had not been settled yet, one way or the other?

A. That is right.

Q. And you decided to become a member of Local 117, not until you spoke to Mr. Kissick, which was after you spoke to Mr. Moore, is that correct?

A. That is right."

McDonald submitted his application for employment on February 20. On the evening of February 21, Red Henry, head shipping clerk, telephoned him and told him a job was available, and according to McDonald, he would have to "clear through the Teamsters." McDonald decided to think it over and on the following Thursday, February 23, at 4:45 P.M., he came to the plant and spoke to Moore. According to McDonald he was

informed that he had to join the Teamsters and asked "why should you be the only one not to join the Teamsters when everybody else has?" McDonald stated that he refused to join (R. 255-258). McDonald, like virtually all of the others, had previously been employed with Craftmaster (R. 255), but had had interim employment elsewhere.

It will be remembered that the McDonald incident occurred *after* the contract containing the Union Shop clause had admittedly been executed. There is no testimony as to *when* McDonald would have to "clear through" or "join" the Teamsters. The conversations could have just as reasonably referred to the perfectly legitimate requirement in the contract of joining 31 days after the commencement of employment. Instead, the Board read into the testimony the inference that Moore, in effect, was attempting to impose a closed shop requirement in the case of McDonald.

In any event, notwithstanding the charge (R. 6) that Englander instructed each applicant to go to the offices of the Teamsters and comply with certain conditions precedent to hire, we find a situation where two out of a possible 126 persons were assertedly so instructed by Englander and through Moore and not Sparrowk. These incidents, if they occurred as the Board found they did, were isolated, casual and remote, and could not possibly have had a substantial effect on the over-all situation. It should still be borne in mind that only the Griffin incident occurred prior to the execution of the contract. Is it unlawful interference, coercion, assistance or discrimination where the improper conduct which the Board says was applied to help the Team-

sters and hurt the other unions was applied in the case of less than 1% of the job applicants? An employer can be meticulously fair in top management dealing with employees, and if in an isolated one or two cases, arising through subordinates, some improper conduct might be inferred, the tail should not be permitted to wag the dog.

Isolated statements of supervisors, contrary to the policy of the employer and neither authorized, encouraged or acquiesced in by him, do not support a charge that the Act has been violated. *N.L.R.B. v. Hart* (CA-4, 1951) 190 F.(2d) 964, and cases above cited.

Respondent urges that in any event the McDonald incident cannot affect the outcome of this case, except from the possible standpoint of his reinstatement with back pay. The reason for this is that by the clear language of Section 8(a)(3) (see Appendix), unlawful assistance rendered *after* the execution of a union shop contract does not invalidate the contract. Respondent maintains, however, that the fragmentary nature of the evidence pertaining to McDonald and the isolated nature of the incident should prevent the enforcement of the Board order as to him as well. The Board begs the very question under consideration when it points out in its brief (pages 17, 24, 25) that a union security clause with an assisted union is in itself unlawful, since there was no such assistance.

CONCLUSION

Considering the time and effort expended by the Board in the presentation of this case and the specific charges in the Complaint as to the date on which the premature contract was executed and as to the nature of the unlawful action otherwise taken by Sparrowk and his subordinates, along with the fact that the matters in controversy were not discussed in secret but in the presence of up to 126 workers, one could reasonably anticipate that if such charges were well-founded there would be some direct evidence of a substantial nature to support them. Still, all that emerges from the record is a series of inferences heaped upon inferences drawn by the Board as to when the agreement might have been entered into (on or about January 16, before February 10, before February 14, etc.) despite direct undisputed evidence that the execution date was February 15 or 16. To this should be added that the improper "motivation" ascribed to Sparrowk's actions and the Board's own findings as to what he actually did or said fail to show the type of conduct prohibited by the Act. The isolated occurrences involving two members of the subordinate supervisory staff fall far short of supporting the charges in the whole context.

Decree should be entered denying enforcement and, on this respondent's petition for review, setting aside the Board order in its entirety.

Respectfully submitted,

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APPENDIX

The National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sections 141, *et seq.*) reads, in part, as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an **unfair labor practice**) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . .

* * * * *

(c) The expressing of any views, argument, or opin-

ion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 15833

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM KLEIN, BERNARD B. STIMMEL
and DAVID BLONDER,

Appellants,

vs.

RANCHO MONTANA DE ORO, INC.,

Appellee.

Appeal from the United States District Court
for the Southern District of California,
Central Division.

APPELLEE'S REPLY BRIEF

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, Calif.

Attorney for Appellee
Rancho Montana de Oro, Inc.

FILED

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RANCHO MONTANA DE ORO, INC.,

Appellee.

APPELLEE'S REPLY BRIEF

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

Your appellee, Rancho Montana de Oro,
Inc., respectfully replies to the opening brief on
appeal of the appellants, Bernard B. Stimmel,
William Klein and David Blonder, herein as
follows:

Actually the sole questions on appeal are
these:

1. Did the trial court err in allowing

\$350.00 to Simmel and Klein in addition to the \$700.00 they had previously received as services for the corporation prior to proceedings in bankruptcy?

2. Was this adequate or more than adequate compensation for advising the corporation's president to have the corporation apply for relief under the Farm Act which had expired six years before, or to let the property be sold under a power of sale in a deed of trust?

3. Did the trial judge err in allowing Blonder \$250.00 for one day's work getting out the papers for a Chapter XI proceeding and a stay of threatened sale under a second trust deed?

The appellants have attempted to befog the issue by an injection into the case of a purported late appeal from the order confirming the amended and new plan of arrangement.

Appellants themselves, although attorneys purporting to specialize in the practice of bankruptcy, never at any time filed any objections to the new plan of arrangement nor themselves ever made any motion in the court below to set aside the new plan of arrangement. Their sole effort was to get more money under the plan and to take its benefits. Not having received all that they wanted or asked for, they seek to attack it for the first time in this court. They are estopped from doing so.

They have also waived any right, if they

had any, to raise such objections on appeal.

In Leavit v. Glen L. Clark & Co. et al., 205 Pac. 2d 747, the court said:

"When the invalidity of a contract has not been raised in the trial court it will not be considered on appeal. King v. Meyer, 35 Cal. 646, 649; Grimes v. Nicholson, 71 Cal. App. 2d 538, 542; 162 P. 2d 934; Title Insurance & Trust Co. v. Graham, 44 Cal. App. 2d 660, 662; Heesy v. Vaughn, 31 Cal. 2d. 701, 710, 192 P. 2d 753. "

Had the plan of arrangement not gone into effect and fresh money supplied to bring the trust deeds, in default, up to date and current, and to pay off the unsecured creditors, the appellants would have been completely wiped out by a sale under the delinquent trust deeds. It would be inequitable to permit them to try in the trial court to get funds made available by the plan, and in this court, because the amount did not satisfy them, to seek to nullify the plan.

On September 9 and 10 and October 14, 1957, the appellants came into court, and were heard fully by the court on what they claimed were their services and what they thought these services were worth. The plan which put fresh money into the corporation, and removed the immediate danger of foreclosure, looked sweet and attractive to them, and they sought with avid and avaricious eyes to get the trial court, acting under the plan, to give them a good part of it. They voiced no objection to the

plan, made no motion to set it aside, and presented neither evidence nor argument, nor authority against it. Their sole effort was to get exorbitant fees. There was also a forwarding arrangement between San Francisco attorney Stimmel and Klein who passed on the actual legal work to Los Angeles attorney David Blonder. (R. 114).

Although Stimmel and Klein were served with copies of the proposed new plan of arrangement, Stimmel being served with two copies, and Blonder with a copy prior to the hearings, none of them showed up at the hearing of June 10, 1957, nor the ten days which followed nor at any time until September 9 and 10th. The trustee, who had moved to set aside the order confirming the plan, did not press it, presenting no argument against it on September 10 and September 11, 1957. (See docket entries and Reporter's Transcript). The trial court on each of these dates entered his order denying the motion to vacate and set aside the order confirming the plan. (R. 177. Docket entries). No appeal was taken by the trustee or anyone else from these orders.

STATEMENT OF FACTS

The facts, as presented by the records and files of this case, and the documents and exhibits in the court below, are as follows:

Rancho Montana de Oro, Inc., is a farm located in San Luis Obispo County, consisting of approximately 4487 acres of land of which

approximately 4000 acres was used for raising livestock and the balance under cultivation for the production of farm products. (Petition for restraining order filed January 5, 1956; See Appendix). All the stock of the corporation was owned by Irene Starkey McAllister, who operated the farm and ranch.

There was a first trust deed on the property in favor of Connecticut Mutual Life Insurance Company for \$160,000, bearing five percent interest and a second trust deed in favor of the Pinole Land Company, owned and controlled by Leo Jarvis for \$40,000, bearing eight (8) per cent interest per annum. Both first and second trust deeds also required reduction of the principal each year.

Because of a bad cattle season neither had been met, with the exception of an interest payment on each of the notes.

The taxes, approximating \$4,000 annually had also not been met and were in default.

A number of obligations had also been incurred to unsecured creditors for farm equipment and necessities for farming the ranch, these being unsecured creditors in excess of thirty thousand dollars. (Docket of Federal Registry).

Mrs. McAllister, confronted with this picture, conferred with Stimmel and Klein, attorneys in San Francisco. She had previously sought refinancing from Leo Jarvis, a real estate dealer in Fresno, California. He had

advanced her \$40,000 on a second trust deed, bearing eight percent, and had also secured from her a deed for one-half interest in the ranch, which deed he had placed in the name of the Pinole Land Company, a corporation largely owned and wholly controlled by him.

Mr. Klein testified: "I was acquainted with some people in San Francisco -- and I told Mrs. McAllister that it was a very difficult deal I didn't know what we could do with it, if anything; the time was running short; I told her if we did anything in the matter, I wanted \$1500 cash retainer, which she said she didn't have, and we wanted a \$25,000 fee or a one-quarter interest in the property, for our efforts." (R. 81)

Klein then said he tried to arrange some financing with brokers who represented "long-shot money" (R. 81) and was unsuccessful. He got Mrs. McAllister to mortgage her furniture to the extent of \$1775 and received \$700 for himself, out of it. (R. 86).

Mr. Stimmel contacted a Mr. Edelman, who went down and looked at the property, but was not interested in advancing money on a second trust deed, but that he would be interested in the purchase of the property at approximately \$350,000. (R. 86). However, no actual commitment was made by or with him.

Following unsuccessful efforts at refinancing by Klein, Leo Jarvis holder of the second trust deed, advised that he was proceeding with a foreclosure sale. (R. 89) The sale was set

for January 6, 1956 at 11 a. m. at the Title Insurance and Trust Co. at San Luis Obispo.

Klein testified as follows: "If this foreclosure proceeding takes place, we are going to be in a bad way, we are going to be in a lots bigger muddle than ordinarily. 'I said: We should file proceedings under Chapter 75 of the Farm Relief Act' and while the Farm Relief Act had expired and had not been re-enacted by Congress, our courts were still accepting petitions under that Chapter." (R. 90).

He said they prepared an agreement giving her an option to pay either \$25,000 in cash or a 25 per cent interest in the stock that was issued and outstanding of the corporation. (R. 92).

She accepted neither, but hurried to Los Angeles and saw David Blonder, and the next he knew, he testified, there had been a petition filed under Chapter XI in Los Angeles and the forced sale of the property by the Title Company on behalf of Leo Jarvis was restrained. (R. 93).

Mr. Blonder saw Mrs. McAllister January 5, 1956 "and reached the conclusion very quickly, although the people up north thought that perhaps a Section 75 proceeding should have been instituted, that because of the fact that Section had not been re-enacted some time previously, the only possible procedure, at least in my opinion, was the immediate filing of a Chapter XI proceeding and the obtaining of a restraining order, if possible." (R. 119) He also communicated the same day with Referee

Calverly. (R. 119) The petition was completed, served and filed shortly before five o'clock that day (R. 120). Mrs. McAllister took the papers herself, after herself paying the fee of \$45. and served them. (R. 120).

On January 30, 1956 Mr. Jarvis moved to set aside the restraining order so that he could proceed with the foreclosure sale. Mr. Blonder did not appear but someone from his office appeared. He was in the case as counsel of record under March, 1956. (R. 122)

Mr. Blonder did not file any creditor's claim, but filed a petition as attorney. He testified "I recognize that any fees to which I am entitled are subject to approval of the court, and we of course are perfectly willing to accept any fees which the court feels are reasonable." (R. 124) After the trial court allowed him \$250. he changed his mind.

Mr. Klein filed a creditor's claim on April 12, 1956 in the sum of \$24,602.63. This claim was opposed by the trustee who on September 4, 1956 filed his opposition to the claim. The claim fails to itemize the services claimed to have been rendered. Neither the claim, nor the opposition, came on for hearing before the referee

Blonder's plan of arrangement was rejected. On May 8, 1956 an amended plan of arrangement was proposed and later rejected.

On June 5, 1956 the referee filed an order of adjudication, and an order that bankruptcy be

proceeded with. (See Docket)

On July 16, 1956 the trustee petitioned the court for sale of the real estate. The petition alleged that the property had a gross value of approximately \$250,000.

Two appraisers were appointed by the referee. Elmer Moody, an appraiser appraised the property at a gross value of \$240,500. Richard L. Willett, an appraiser, appraised the property at a gross value of \$230,000.

There was then due on the property \$160,000 plus interest on the first trust deed, \$40,000 plus interest on the second trust deed, unpaid taxes in the sum of \$8000. and unpaid unsecured creditors in excess of thirty thousand dollars.

The referee took testimony as to whether this was a farming corporation, and concluded that it was a farming corporation, and although all the stock was held individually by Mrs. McAllister who had operated the farm individually, the court held that the corporation was not her alter ego and that a corporation was not entitled to the exemptions from bankruptcy of an individual farmer. Sec. 379, Bankruptcy Act. A petition for review followed.

During the pendency of this review the referee withheld sale of the property in bankruptcy. But on March 7, 1957 the Connecticut Mutual Life Insurance Company, holder of the first trust deed, filed notice of default in the office of the recorder at San Luis Obispo,

pursuant to State procedure under the laws of the State of California, and made demand for the payment of the whole amount due under its agreement. The property was then in jeopardy of being sold out under the power of sale under the first trust deed after June 7, 1957, thus wiping out all other creditors, including appellants' purported claim.

On May 28, 1957 Morris Lavine deposited fresh money in the federal court which Connecticut Mutual, holder of the first trust deed, was willing to accept and bring its two-year delinquent trust deed up to date, as was also Leo Jarvis, holder of the second trust deed, making them current upon the payment of the same. (See docket of deposits in the Federal Registry).

On May 29, 1957 a proposed new plan of arrangement, proposing to bring the secured creditors up to date and to pay all delinquent taxes and to pay the unsecured creditors in full was presented to the court with a request for leave to file the same. The district judge granted the request and set the hearing for June 10, 1957 at 11 a. m. (See Docket). It was necessary to set the hearing as close to June 7th as possible to cure the default notice of Connecticut Mutual, which neither the trustee nor his attorney had restrained.

The copies of the proposed plan of arrangement were printed, with a place for consents of the debtors on the last page thereof, and were mailed out to all creditors. Some of the mailings were on a different date, than others, but all creditors who were listed or known, and all

parties in interest who were listed or known were served. Mrs. McAllister personally sent a copy of the proposed plan to Mr. Stimmel, which was in addition to the other copy sent out by Mr. Lavine. David Blonder was also served with a copy prior to the hearings and has never questioned the service on him.

On May 29th, 1957 Mr. Lavine also deposited with the clerk of the federal court the sum of \$25,677.44, the amount which Connecticut Mutual had asserted previously in open court, was the amount due them to bring up the trust deed current. He also deposited \$16,400, claimed by Leo Jarvis to bring up the second trust deed to date. He also deposited \$30,000 to pay unsecured creditors their claims. (Docket entries of May 29th). These corporations and individuals were notified that the money was on deposit.

Copies of the new plan of arrangement were received by the creditors who returned them with their consents, or their attorneys wired consents.

On June 10, 1957 the district court held its hearing on the plan. Neither Mr. Blonder, who practices law in Los Angeles, nor Stimmel and Klein, whose offices had received two copies of the proposed plan appeared, in person, by letter or otherwise.

At this hearing, the trustee asked to have Ernest Utley appointed as an additional counsel for the trustee. The court granted his request. Mr. Utley immediately began a series of objections to the plan.



The only unsecured creditor who appeared in court was Leo Jarvis, who had a \$1500 unsecured claim, as well as his \$16,400 secured claim. He consented to the plan in open court.

The attorney for the trustee, Mr. Utley, sought to delay the proceedings, sought to have them transferred back to Referee Calverly, and conducted other maneuvers designed to defeat the plan.

Gerald Hagar, representing the Connecticut Mutual, urged the court to approve the plan, as it was the first time that the creditors had seen any real money. The court granted the motion to approve the plan, but stated he would allow time for any objections thereto, to be filed and retained jurisdiction to decide them. NONE WERE FILED WITHIN THE TEN DAY PERIOD WHICH FOLLOWED. (R. 20-21).

AS A MATTER OF FACT, NONE WERE EVER FILED IN THE DISTRICT COURT BY ANY CREDITOR TO THIS DATE.

On June 21, 1957 a petition to confirm the new plan of arrangement was filed with the district court, and approved by him, retaining jurisdiction to hear any objections. The order was entered on June 25, 1957.

On June 27, 1957 the trustee filed objections to the proposed order approving the plan of arrangement. This was seventeen days after the trial judge had held the hearing and allowed

ten days time to pass for anyone to file objections. On July 1, the trustee filed objections to payment of creditor's claims of 100 cents on the dollar. This was twenty-one days after the date the court heard the matter and waited ten days time for objections. These objections were filed by the trustee after Connecticut Mutual Life Insurance Company had been paid \$27,998.15 on their loan on June 27, 1957 (see Docket of Register) making their loan current and not in default. There was also sent to Leo Jarvis the sum of \$16,400. More interest was due him due to the delay, and he was paid additionally the sum of \$213.71. The county tax collector of San Luis Obispo was also paid \$12,001.73. On June 26, 1957 following the confirmation of the plan and no objections filed within the time awaited by the court, and the entry in the court's records as of June 25, 1957 the following unsecured creditors were paid one hundred cents on the dollar, some of them with interest: Joseph Rosenberg, \$2750.; George Sousa, \$8,250.; Pat E. Milligan, \$583.26; William W. Warren, \$3,885.09; C. H. Brandt, \$3,283.24; Taylor Walcott, \$2,530.12; Walter J. Goodell, \$1,977.71; Morosa Bros. Transportation (cattle) \$3,379.54; Leo Jarvis, \$1,500.; Paul Noyes \$780.; Farmers' Hardware, \$202.41; Leon Mumford, \$600.; T. O. Waer, \$2,107.52; Paul W. Lyles, \$631.63. (See clerk's docket).

The court on July 12, 1957 continued the hearing on the matter of the trustee's objections, attorneys fees, receiving the final report, etc., to September 9, 1957.

Stimmel and Klein, and David Blonder

appeared in person at that time in a hearing on application for fees. No objection was made by them at that time to the new plan of arrangement, nor did they ask the court to consider the trustee's objections as their own. Rather they sought fees under the plan with money now available. The matter was continued to September 10th, 1957 at which time the court heard Mr. Stimmel and Mr. Klein's claim fully as to the purported value of their services.

William Klein testified on September 10th, stating in substance that he had advised Mrs. McAllister, president of Rancho Montana de Oro, Inc., to proceed under the Farm Act, Section 75, which had expired in 1949. (R. 90) He also told her that Mr. Stimmel had a friend who was interested in buying the place at a foreclosure sale. (R. 86) They received \$700 in cash, resulting from a loan on furniture. Mr. Klein wanted \$1500 at once, and wanted \$25,000 or one-fourth interest in the property. She left him and came to Los Angeles where she saw David Blonder, who said the Farm Act would not apply, and he redrew the petition under Chapter XI. Mr. Blonder spent one day preparing the same and getting a restraining order, heading off the sale set for the next day.

Klein gave his opinion that the reasonable value of his services were \$25,000, although he had failed to get any money to rehabilitate the ranch and although he had not filed any papers, not even under the expired Farm Act. He left in a hurry for an airplane, (R. 129) as he had other commitments in San Francisco.

Morris Lavine, attorney-at-law handling bankruptcies, testified that Klein's services were worthless to the estate (R. 166 and 167), that advising a client to apply under the expired Farm Act Chapter 75 would have permitted sale under the deed of trust, and lost the property for appellee. He also testified that Blonder was entitled to a reasonable fee for one day's services, as determined in amount by the court. (R. 167) He also submitted his contract with Irene Starkey McAllister to the court. (Exh. 5).

Nothing was said either by way of motion, evidence, argument, or discussion as to the trustee's motion to set aside the order confirming the plan of arrangement by appellants or anyone, except that Morris Lavine, attorney for the appellee asked the court to rule on the motion and dispose of it. The trustee's attorney made no objection. The court then denied the motion to set aside the order confirming the plan (September 10, 1957), and entered it in the minutes and docket. It again did so on September 11, 1957, and continued the other matters as to fees of attorneys to October 14, 1957. At that time further cross-examination of Morris Lavine was permitted to William Klein and the matter of fees was submitted. (R. 183)

Because the attorney for the trustee thought all orders in bankruptcy ought to be in writing the district court directed Morris Lavine to prepare a written order with reference to his denial of the trustee's motion to set aside the order entered June 25, 1957 approving the new plan of arrangement.

On October 21, 1957 the court rendered its judgment regarding attorney fees. It made ultimate findings that Stimmel and Klein be allowed to keep the \$700 they had previously collected and that they be allowed \$350. additional. It also found that Blonder's services were of the value of \$250. It found that Morris Lavine's contract was fair and equitable and not in violation of any law (Order of October 21, 1957).

On October 25, 1957, the court entered its judgment again denying the motion of the trustee to set aside the order and judgment of June 25, 1957 approving the new plan of arrangement, and reserved further jurisdiction. The clerk of the court, as shown by the docket, sent out notices to all attorneys.

On November 29, 1957 Roy B. Woolsey, who had been a stranger to the entire proceedings, and who was not substituted into the case, filed a notice of appeal from the order of June 25, 1957 and from the fees fixed for Stimmel and Klein and Blonder.

On or about December 20, 1957 the three attorneys filed affidavits that Woolsey was now representing them.

A motion to dismiss the appeal as to the first ground was reserved by this court until hearing on the merits of the appeal re the attorneys' fees.

We now renew our motion to dismiss the first ground of appeal for the following reasons:

1. Neither Stimmel and Klein nor

Blonder objected to the plan in the court below. Only a creditor can object to a composition or plan of arrangement. In re Downtown Wet Wash Laundry, 53 Fed. 2d 133. None was ever made by Stimmel and Klein or Blonder AT ANY TIME in the district court. Nor did they ever themselves make any motion to set aside the plan.

2. The trustee's duties do not encompass making objections to a plan of arrangement in which defaulting trust deeds and taxes are to be brought up to date so that the property is not sold out from under the unsecured creditors which would wipe them out, and \$30,000 in cash is deposited to pay off unsecured creditors one hundred cents on the dollar.

3. No appeal was taken by anyone from the order of June 25, 1957 confirming the plan of arrangement. That appeal had to be taken within forty days after its entry. In re Acqua Hotel, 251 Fed. 2d 138.

Pfister v. Northern Illinois Finance Corporation, 317 U. S. 144; 87 L. Ed. 146:

"A refusal to modify the original order, however, requires the appeal to be taken from the original order, even though the time is counted from the later order refusing to modify the original order."

4. The trustee did not present any evidence, argument, or press his motion to vacate the order of June 25, 1957 when it was heard on September 10 and 11. Nor did he express any dissatisfaction, or anything at all,

when the court passed upon it. Nor did he appeal or file notice of appeal from the order denying his motion. The present appellants are in no position to step into the trustee's position in order to prosecute an effective appeal, or his earlier denied motion, unappealed from.

5. The appellants sought to take advantage of the benefits of the plan which provided money and still seek to take this advantage. They were and are only in a position to collect what the court below awarded them because the plan is in operation, and they, along with other unsecured creditors have not been wiped out by the sale of the property under the power of sale in the deed of trust. They came into court with their claims and the court heard them fully. They cannot in the court below proceed under the plan to seek money, and when dissatisfied with the amount, seek relief in this court by attacking the plan.

6. In view of the fact that the appellants themselves never filed any objections to the plan, never themselves moved in the court below to set it aside, never presented any argument thereon, this court is without jurisdiction to hear or entertain their appeal on this ground.

We now come to each of the arguments of appellants:

I.

APPELLANTS ARE IN NO POSITION TO ATTACK THE NEW PLAN, WHICH THEY NEVER THEMSELVES OBJECTED TO IN THE COURT BELOW. THEY CANNOT RAISE THE ISSUE FOR THE FIRST TIME IN THIS COURT. ONLY A CREDITOR CAN OBJECT TO A COMPOSITION OR PLAN OF ARRANGEMENT. HE MUST DO SO IN WRITING, SET OUT THE GROUNDS, SET IT DOWN FOR HEARING AND HAVE THE COURT BELOW PASS UPON IT. APPELLANTS THEREFORE HAVE NO JUSTIFIABLE OR APPEALABLE GROUNDS OF ATTACK ON THE PLAN.

In In re Downtown Wet Wash Laundry,
53 Fed. 2d 133, the court said:

"The rule is, and ought to be, that only creditors may oppose confirmation of a composition. "

Since Stimmel and Klein and Blonder never opposed confirmation of the plan, did not move to set it aside, and presented nothing in the trial court thereon they are without jurisdiction to attack it in this court.

The contract between Attorney Lavine and the debtor, which was incorporated in the plan of arrangement is not violative of §155, U. S. C. Title 18 or General Order 42 or §29 of the

Bankruptcy Act, 18 U. S. C. A. par. 154.

The statement and analysis of the plan of arrangement by appellants are, to put it mildly, misleading.

The plan called for fresh cash in an amount to bail out the corporation from its ruinous liabilities, which made its stock worthless. Bearing in mind that \$200,000 principal was owing to the first and second trust deed holders and in default, two years; that \$15,970 was owed to the first trust deed holder for interest; that \$1600 was owed in interest to the second trust deed holder; that about \$12,001 was owed in delinquent taxes and more than \$30,000 was owed to unsecured creditors or in excess of \$260,000 owed, and the highest appraised value of the property was \$240,500 by the referee's appraiser, the injection of \$85,000 into the corporation on a third trust deed, bearing 6 per cent interest, could not by any stretch of the imagination be violative of the Title 18 §§154 and 155.

ALL THAT THE CORPORATION GAVE FOR THIS \$85,000 and other financial support was a third trust deed, and a note bearing 6 per cent interest, not payable for ten years unless the property is sold, and no interest to be paid on the same for three years. No part of the assets of the corporation were paid to Morris Lavine, and none was agreed to be paid. The statement of respondent that Morris Lavine was acquiring an interest in the assets of the debtor's estate is therefore wilfully and deliberately false.

Furthermore, it was the corporation, and not Mrs. McAllister that was in bankruptcy, and needed to be bailed out. Her stock was never an asset of the bankrupt corporation. Of course she personally wanted to protect her stock and make it worth something.

A corporation is a separate entity from the stockholders. Erkenbrecher v. Grant, 187 Cal. 7; 200 P. 841.

In Merton L. Miller, Respondent, v. Charles J. McColgan, as Franchise Tax Commissioner, etc., Appellant, 17 Cal.2d 432, 436, the Court said:

"[1] It is fundamental, of course, that the corporation has a personality distinct from that of its shareholder, and that the latter neither own the corporate property nor the corporate earnings. The shareholder simply has an expectancy in each, and he becomes the owner of a portion of each only when the corporation is liquidated by action of the directors or when a portion of the corporation's earning is segregated and set aside for dividend payments on action of the directors in declaring a dividend. This well-settled proposition was amplified in Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81 [46 Sup. Ct. 256, 70 L. Ed. 475], wherein appears the following cogent language: 'The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the

corporation, as they may be declared in dividends arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property.¹ Since the shareholder by reason of his stockholding is entitled to share in any dividends which may be declared, it logically follows, as appellant urges, that the source of dividends is the stock, because income which comes to one solely because of ownership of property has a source in that property."

Furthermore, the contract between Mrs. McAllister and Mr. Lavine was for her stock, individually owned, and not a corporate asset. She was not in bankruptcy.

The referee had already held that the corporation was not her alter ego. That doctrine has no application to the facts here.

The contract between Mr. Lavine and Mrs. McAllister, however, was strictly for financing and aid in operating the ranch and obtaining other business contracts, such as an oil lease, grazing contracts, etc., for the ranch. The contract further provided for a salary for Mrs. McAllister of \$500 a month. In entering into the contract, Mr. Lavine dealt with her through two able counsel of her choice -- Ted James Kukula of San Francisco and

Maurice Goodman of Los Angeles. The contract was submitted to the district judge for his examination for its fairness and equitableness, and that court found it to be fair and equitable. (The contract is Exhibit 5 in evidence).

Morris Lavine waived all attorneys' fees, and did not claim any, and so testified. (R. Tr. 164)

But Mrs. McAllister (now Mrs. Starkey) has not complained and does not complain. Appellants act as if they were still her attorney and attempt to set aside the personal contract by which she managed to save the corporation and pay up secured creditors, pay taxes, pay the unsecured creditors, infuse value into her valueless stock, and get herself a salary of \$500 a month.

Of course if they were to succeed in setting aside the plan then the corporation would have to repay Mr. Lavine the money had and received by it, and it would again face a condition in which Mr. Stimmel's friend, Mr. Edelman, might have a chance to buy it. This would be an inequitable result in a court that acts upon equitable principles.

Unlike Mr. Lavine's agreement for half of Mrs. McAllister's personally owned stock for a refinancing deal, Mr. Klein asked for one quarter interest in the property for his efforts (R. 81, 104). Do appellants come into this court of equity with clean hands?

Appellants make such misleading statements as "this contract in effect was tantamount to a transfer by the debtor to Attorney Lavine of an interest in the bankruptcy assets." "The contract between the debtor and its attorney Morris Lavine was void." (R. 54).

The corporation -- the debtor or bankrupt -- never transferred anything to Mr. Lavine. Its only contract with Mr. Lavine was a third trust deed for a loan of \$85,000, payable at the rate of six per cent (less than present bank rates of loans on real estate) with no interest payment due for three years. Appellants surely do not contend that the loan which saved the corporation is void.

Mr. Lavine agreed to and did obtain a valuable oil lease with Tidewater Oil Company; dating it back to the time when the trustee should have obtained it and didn't, and Mr. Lavine also negotiated and drew grazing leases for the corporation -- all without any charge for legal expenses.

We have gone at great length to explain the deal to the court, because of the malicious and unjustified attack upon Morris Lavine who came up "with dollars and money" to save the corporation from bankruptcy where the appellants had failed. (Test. of David Blonder, R. 122).

The court therefore was fully justified and correct in ratifying the contract between Morris Lavine and Irene Starkey McAllister,

not a bankrupt, concerning her individually owned stock. She realized that half of something of value was worth more than all of nothing. She had previously entered into a similar deal with Leo Jarvis, a real estate broker, who had advanced \$40,000 on a second trust deed, bearing 8 per cent, but he did not take up the other indebtedness, and there were other differences, and appellee made an agreement with him cancelling out his deed for half interest of the property. For other reasons not relevant here he agreed to cancel his deal.

Appellants therefore have no justiciable interest or legal ground for their contention on this point, and have used it as a possible threat to appellee to delay the successful operation of the plan and to settle their unjustified claim for an exorbitant price.

II.

APPELLANTS WERE GIVEN ADEQUATE NOTICE, AND A FULL HEARING ON THREE DIFFERENT DAYS. THE PURPOSE OF NOTICE IS TO AFFORD A HEARING TO ANYONE WHO WISHES TO BE HEARD. THESE APPELLANTS WERE FULLY HEARD, AND HAVING APPEARED AND BEEN HEARD WAIVED ANY OBJECTIONS REGARDING NOTICE. FURTHERMORE WHEN THEY DID APPEAR THEY DID NOT OBJECT TO THE PLAN, BUT SOUGHT BENEFITS UNDER IT, AND THEREFORE IMPLICITLY RATIFIED IT.

As we pointed out in our statement of facts shown by the record, Connecticut Mutual Life Insurance Company recorded notice of default and intention to sell under its deed of trust on March 7, 1957. Therefore, unless something was done within three months as provided by California law, the whole amount of indebtedness of \$160,000, plus interest became payable. This would have defeated any plan. Funds to carry out the plan became available May 29, 1957 and were deposited in the federal registry with the court (See Register Account, Appendix A). The Court therefore set the hearing date on the plan for June 10, 1957, and copies of the plan were promptly sent out, as soon as the printer got them off the press. A copy was mailed to Stimmel and Klein at their San Francisco offices by Morris Lavine. A second copy was mailed to Mr. Stimmel by Mrs. McAllister, prior to the hearing, and

acknowledged to her by him. A copy was also mailed to David Blonder at his Los Angeles office prior to the hearing of June 10, 1957 and Klein had a forwarding arrangement with Blonder. (R. 114).

Blonder, the attorney to whom Stimmel and Klein forwarded the case (R. 114) with offices eight or nine blocks from the Federal Building, did not appear. At no time did he contend that he did not have adequate notice, or that he could not have appeared to act for himself or his forwarding attorneys. Nor did Stimmel and Klein appear either in person or by writing.

At the hearing which did occur on June 10, 1957, three days beyond the date when the default on the first trust deed had to be made good, Connecticut Mutual Life Insurance Company, appeared through its attorney, Gerald Hagar, and agreed to accept the arrangement and make the trust deed current by the payment of delinquent payments and interest and expense. (R. 17). L. Kenneth Say, attorney representing Leo Jarvis, owner of the second deed of trust, in default, was also in court, and approved the agreement to bring their trust deed up current and that it was acceptable to his client. (R. 6).

The court then reserved jurisdiction to hear objections and said he would hear anyone who had objections.

The court was frankly confronted with

the same problem that frequently confronts it with perishable, shrinking or destructible assets. In these circumstances Congress has given the court the power to act quickly and to conduct a sale of the assets even without notice. Here, the court had to act, quickly, to prevent the secured creditors from selling under their power of sale, thus destroying any chance of the unsecured creditors getting even a dollar.

The trial court stated he would give anyone who objects a hearing. In the proceeding of June 10th, 1957 the trustee's attorney seemed mainly concerned with Stimmel and Klein's claim. He was repeatedly looking for something to defeat the plan. There can be no doubt that he immediately contacted them. (R. 15) Eleven days elapsed before a petition was filed to confirm the plan, and fifteen before it was entered. No objection was made during that time by appellants themselves, nor even later. The trustee filed objections on June 27th, two days after the plan was confirmed, but not Stimmel and Klein or Blonder.

A hearing on all matters went over to September 9, 1957 when Stimmel and Klein and David Blonder first appeared and were given a full hearing on September 10th and September 11 and October 14, 1957. AT NO TIME DID THEY RAISE THEIR VOICE EVEN ONE SYLLABLE AGAINST THE PLAN. Their only concern was for more money for attorneys' fees.

By their appearance and being accorded a full hearing they waived any objections to notice.

As stated in In re Gurwitz v. Wise, 122 Me. 444, 120 Atl. 536, the object of notice is to protect the rights of creditors.

"If they had actual knowledge of the proceedings in time to do this, equal protection is afforded them."

The court pointed out that the plaintiff had actual knowledge in the case in ample time to protect his rights.

"He received notice and in time to have participated in all of the material proceedings and to have secured his proportionate share of the estate."

Appearance and participation are waiver of notice. Matter of Inter-City Trust Co., 295 Fed. 495, cert den. sub nom Neal, 265 U.S. 589.

Even if there is any doubt about the validity of the court's action in a given case of dispensing with notice, an objecting party's appearance and participation before the court in a discussion concerning such sale before its consummation is a waiver of any rights to assert such invalidity. See Matter of Inter-City Trust Co. supra.

On September 10, 1957 the trial court gave Stimmel and Klein a full hearing. Before the hearing was concluded, Klein said he had a plane reservation for 5:15 (R. 95). David Blonder, of Los Angeles, remained. There was no indication that the hearing had concluded,

and at the close of the day the court adjourned until the following day. Neither Stimmel and Klein, nor Blonder showed up. But Utley, and Morris Lavine appeared and continued the hearing, as necessary. Stimmel, Klein and Blonder chose to absent themselves without any concern as to what other testimony would be put on. Why they thought their extravagant claims for fees would go uncontested is unknown. But in any event, the court again accorded them the right to cross-examine Morris Lavine on October 14, 1957 and before ruling on their claims. (R. 181).

III.

THE TESTIMONY OF APPELLANTS
WAS CONTRADICTED BY THE
ATTORNEY FOR THE DEBTOR
CORPORATION. THE TRIAL COURT,
CONSIDERING ALL STANDARDS
CHOSE TO APPLY ITS OWN YARD-
STICK OF THE VALUE OF
APPELLANTS' SERVICES. THE
DETERMINATION OF THE AMOUNT
OF FEE WAS A FACT FOR THE
TRIAL COURT'S DETERMINATION.
THERE WAS NO ABUSE OF
DISCRETION.

The appellants continually seem to fail to understand or recognize that in California a corporation and its stockholders are separate entities. Erkenbrecher v. Grant, 187 Cal. 7. It is the corporation, and not its stockholder, who was and is in the bankruptcy

court. Morris Lavine, as attorney for the corporation, appeared in opposition, and testified as to the lack of value of appellants' services (R. 161). Appellants at no time moved to strike it, but cross-examined on the basis of it. The trial judge had a right to decide what probative force he would give to any or all of the testimony.

The testimony of Mr. Lavine was that Mr. Klein's services were valueless to the estate. (R. 166, 167). He also expressed the opinion that Klein should be compelled to return some of the \$700 he received. (R. 167). The trial judge did not reject Mr. Klein's claim in toto or order him to return some of the money he received prior to bankruptcy. The trial judge allowed him to retain the \$700. and allowed \$350. additional. Had bankruptcy proceeded with, it is doubtful if he would have ever received this additional amount.

In matters of attorneys' fees, judges are able to fix the same from their general experience and knowledge, taking into consideration the nature of the work, the benefits or lack of benefits to the estate, the success or failure of accomplishment. Bearing in mind that the debtor in this case was the corporation, the efforts of Stimmel and Klein were of no benefit to it. Rather, their services jeopardized the corporation's property, as they recommended a procedure under the expired §75, the Farm Act, which went out in 1949.

What then is the reasonable value of legal services by an attorney who recommends

to an officer of the corporation that it proceed under an act that had expired six years before?

Supposing a client came to a lawyer to take an appeal six years after the time for filing notice of appeal. Or supposing some woman sought advice of a lawyer regarding a breach of promise suit in California after the law expired, and he told her to file it anyhow. What would the value of such legal services be?

In this case, the situation would be far more serious. Connecticut Mutual was ready to sell under the power given it in the first trust deed and Jarvis was waiting to foreclose on his second trust deed. A petition under the non-existent Farm Act would not have restrained the sale, and the corporation's assets would have been sold under the hammer. The value of such advice and services? Nil.

As a matter of fact we think such advice would have justified a suit for negligence, if it had not been cured by the filing of a Chapter XI proceeding.

The underlying rule is that services rendered must be valuable to an estate, and not to an individual client. Giving business advice is not compensable.

In Re Chicago M. St. P. & P. R. Co.
138 Fed. 2d 433;

Rauscher v. Northern Cities Gas Co.,
41 Fed. Supp. 566;

Teasdale v. Sefton Nat. Fibre Can
Co., 85 Fed. 2d 379.

Taking the standard which appellants themselves have quoted from Dee v. United Exchange Building, 88 Fed. 2d 372, -- we submit that \$1050 for the services was more than reasonable or justified. It appears from Klein's testimony that his time was spent in an unsuccessful effort as a financial broker seeking finances. These, like real estate broker's efforts, are always contingent on success, and he was unsuccessful in his efforts to get financing. His total legal services appears to consist in advising the president of the corporation to proceed under the Farm Act, which had expired six years before his advice. Apparently he did not even take the time or trouble to research the law on that subject. When it came to the law work itself he sent the corporation's president out of the office to David Blonder, (R. 103, 104) with the papers of some kind of a plan under the expired Farm Act. (R. 104). Blonder knew the Farm Act would not apply and prepared a Chapter XI proceeding.

That part of the statement of appellants underlined here that "the testimony of the appellants on the value of their services was not contradicted either by the president of the debtor corporation or by any other witness" is therefore false.

An affidavit, filed by the president of the corporation, regarding the services of Stimmel and Klein, is as follows:

IRENE STARKEY McALLISTER, being first duly sworn deposes and says: That she is the President of RANCHO MONTANA DE ORO, INC., a California corporation, debtor named in the above proceedings. That RANCHO MONTANA DE ORO, INC., was not and is not indebted to Bernard B. Stimmel in the sum of \$24,602.63, or in any lesser or greater sum, or at all. That Bernard B. Stimmel is an attorney located in San Francisco, California; that affiant saw Bernard B. Stimmel on or about the first week of December, 1955, for the purpose of seeing what could be done to refinance RANCHO MONTANA DE ORO, INC.; that Bernard B. Stimmel undertook to get the ranch refinanced and requested a fee of one-fourth (1/4) of the ranch property if he was successful in getting the ranch refinanced. That said B. B. Stimmel did not get the ranch refinanced and did not perform any services of value to RANCHO MONTANA DE ORO, INC.; that at no time were his services of any value or of benefit to RANCHO MONTANA DE ORO, INC., but, on the contrary, were of a nature that were, in fact, injurious to the ranch and caused the threatening of the foreclosure of the ranch property so that it was necessary for RANCHO MONTANA DE ORO, INC. to secure other attorneys to file under Chapter Eleven and prevent foreclosures of existing liens. That Bernard B. Stimmel and William Klein received \$700.00 from Irene Starkey McAllister in cash, for which they performed no service of

value. That if a hearing is held in connection with the claim of Bernard B. Stimmel, that the Court is therefore requested to re-examine the services and to order the refund of the sum of \$700.00 to Irene Starkey McAllister, and for any and all damages caused by the conduct of said attorneys.

Morris Lavine, attorney for Rancho Montana de Oro, Inc., (R. 161) and at the time of testifying, secretary of Rancho Montana de Oro, Inc., (pursuant to agreement carried out under Exhibit 5), testified that Mr. Klein's services were of no value to the estate, that they proved of no benefit to the estate, and that the \$700. already received was far beyond the services rendered. (R. 167).

The trial court was best in a position to appraise the value of these services, and gave Stimmel and Klein \$350. additional.

As the Circuit Court (2nd Circuit) said In re Paramount Merrick, Inc., 252 Fed. 2d 482:

"The attorneys, Finkel and Nadler, complain that the fee of \$500 awarded by the Bankruptcy Court is unreasonably low. In support of this contention they refer to their application for an allowance of \$3,500. There they swear that they performed a variety of services for the benefit of the estate, including obtaining permission to continue the assignee sales and attending both sales subsequent to the filing of the bankruptcy petition, the procurement of a favorable bulk bid on

the fixtures at Levittown, the negotiation of two landlord use and occupation claims arising out of the bankrupt's occupancy of stores on two sites, negotiations involving six secured claims, the preparation of papers, conducting of an examination of the bankrupt's president, attendance at a creditors' meeting, and the answering of 'innumerable inquiries' of creditors during the period from August 23, 1956 to November 14, 1956. The attorneys contend that the continuance of the sales saved the estate approximately \$1,680, that the Levittown bulk bid netted an additional \$9,000, that their adjustment of landlord claims saved \$784.29, and that successful rejection of a secured creditor's claim for counsel fees effected a saving of \$900. They thus claim that over \$12,000 of the \$19,511. net value of the estate was due to their efforts. Unsecured claims total approximately \$62,000. Appellants aver that \$500 does not cover clerical and stenographic expenses.

[4] The attorney for the receiver is entitled to reasonable compensation for his services during the period of receivership by virtue of the Bankruptcy Act, 11 U. S. C. A. §§102, 104, sub. a(1). The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the

estate, the opposition encountered, the results obtained and the "economic spirit" of the Bankruptcy Act to curtail unnecessary expenses. *Levin v. Barker* 8 Cir., 1941, 122 F.2d 969, cert. den. 315 U. S. 813, 62 S. Ct. 799, 86 L. Ed. 1212.

[5, 6] The attorneys' services were considered by the referee. He was best able to pass upon their worth to the estate and his determination was accepted by the Bankruptcy Court. Although we have jurisdiction to review the compensation, 11 U. S. C. A. §47, we are reluctant to overturn the determination unless it can be shown that the allowance was arbitrary and unreasonable. See *Silver v. Rosenberg*, 2 Cir., 1944, 139 F.2d 1020; *In re Ernst*, 2 Cir. 1939, 107 F.2d 760; 3 *Collier, Bankruptcy*, §62.12 pp. 1483-1485 (14th Ed. 1941). We will not normally substitute our judgment for that of the referee and the Bankruptcy Court, see *Silver v. Rosenberg*, supra; *In re Valentine*, D. C. Md., 1956, 139 F. Supp. 576, and we are not persuaded that we should reject their determinations of the proper fees. "

In the Matter of Carolina Scenic Stages,
242 Fed.2d 263, the Court said:

"This appeal was taken by petitioners from an order of the District Judge, allowing them only \$1,250 for services in filing a petition in bankruptcy against

the Debtor under Chapter 10, 11 U. S. C. A. §501 et seq. They filed petitions for an allowance of \$15,000, and the Referee recommended an allowance of \$6,000. Judge Timmerman's order concludes: "The recommended fee is excessive. However, claimants are entitled to something from the estate. In the light of all the circumstances, considering the size of the estate and the number of creditors, a reasonable fee would be \$1,250. Let claimants be paid \$1,250." Claimants here insist that the District Judge erred in "holding that a reasonable fee is \$1,250, and in failing to hold that the sum of \$15,000, is a reasonable fee;" and in the alternative, that he erred "in failing to approve the fee of \$6,000, recommended by the Referee." It is conceded that under Title 11 U. S. C. A. §641(5), the District Judge was authorized to allow petitioners a reasonable fee for filing the petition and necessarily the amount of such fee had to be left to his discretion. We come then to the question of whether we should in effect ignore the opinion of Judge Timmerman, and substitute our own. In answering, we obviously should bear in mind that he presided over the entire rather lengthy litigation involved in the Chapter 10 proceedings.

There are numerous cases holding that in such a situation the compensation found by the trial Judge to be reasonable should not be disturbed unless it is made

to appear that he abused his discretion or that he arrived at his conclusion by way of an erroneous view of the applicable legal principles.

In *Calhoun v. Stratton*, 6 Cir., 61 F.2d 302, at page 303, the opinion sets forth: "Attorney fees cannot be fixed with mathematical certainty. They are to be determined in the exercise of judicial discretion. We cannot interfere unless there has been a clear abuse of discretion or an obvious mistake of law * * * " at page 304. "The statement of evidence embraces the opinion of eminent attorneys that the allowance to attorneys should have been larger, but it is not our province to pass upon the weight of the opinion testimony. " In *re Iron Clad Manufacturing Co.*, 2 Cir., 215 F. 877; In *re Sovereign Corporation*, 7 Cir., 114 F.2d 1013."

The undisputed facts as to Blonder's services is that he did one day's work. No legal research was done by him. His plan obviously followed a form, and encompassed a proposed plan, which he was able to get out during the day. He did not even serve the restraining order. His proposed plan was rejected by the referee, bankruptcy was ordered to follow, and an order to sell the property in bankruptcy was made, based both upon his plan and another plan submitted after he got out of the case.

The trial judge's determination that his services were worth \$250 is correct.

The statement of appellant that Morris Lavine was permitted to be the judge of the reasonable value of the appellants' services, is of course false on its face. As to Stimmel and Klein's services, Morris Lavine not only judged that they should receive nothing, but also return part of the \$700 they received. The judge, however, allowed them to keep that \$700 and gave them \$350 more for worthless services.

As to Blonder, Mr. Lavine expressed no opinion as to the amount Blonder should receive, but only that it should be for the time spent, one day's services. Blonder's petition was supposed to accomplish something for \$250, but these efforts would have come to naught, had the later adjudication remained.

IV

Under Point V appellants again misstate the facts. They say: "Reference is made to the order of October 21, 1957 in which the court stated that appellants Klein and Stimmel were not entitled to any compensation" for their services rendered prior to bankruptcy" etc., (App. Br. 69). The trial Court said no such thing. This is what the trial Court said:

"The claims of Stimmel and Klein arose from transactions prior to the petition originally filed in this case on



January 5, 1956. Most of these services were not strictly legal in nature, but efforts toward refinancing the property. The size of the claim would warrant the court in rejecting it entirely. Fees may only be paid for services in aid of the administration of an estate, *In re Owl Drug Co.*, 16 F. Supp. 139, 145. No contract was ever submitted in writing to this court or received its approval. Nothing appears that shows any particular benefit to the estate. From the testimony, it appears that the firm received \$700.00 from Mrs. McAllister, the President of the corporation, prior to bankruptcy, which she has petitioned this Court to refund. The advances which Mr. Klein asserts were made to Mrs. McAllister will be offset against the \$700.00 paid, and the remainder of the \$700.00 may be kept by Stimmel and Klein for their services. In addition, the Court also awards them the sum of \$350.00 to cover their services.

The sum of \$250.00 is allowed to David Blonder for his services rendered. "

Likewise under their Point VI they assert that the order of October 21, 1957 contains no findings of fact. The court's order clearly contains findings of ultimate fact and conclusions, and was sufficient compliance with Rule 52(c). Appellants did not object to the order for lack of findings, or request the

court for further findings, nor is their appeal based upon this ground, nor is it set up in their specification of errors and questions presented for decision. (Appellants Brief, Pages 51-2).

V

THERE WAS NO JURISDICTION OF APPELLANTS TO APPEAL FROM AN ORDER DENYING A TRUSTEE'S MOTION TO VACATE THE ORDER OF JUNE 25, 1957. THE APPEAL WAS NOT TIMELY FILED.

As we have heretofore pointed out, appellants at no time themselves ever made any motion to vacate the order confirming the plan of arrangement entered June 25, 1957. The motion was made by the trustee's attorney, not appellants, and never joined in by them. The trustee in effect abandoned the motion when it came up on September 10th and September 11, 1957, when the court made minute orders denying the trustee's motion to vacate the order confirming the plan on June 25, 1957. As money became available under the plan, appellants in open court themselves sought to take advantage of the plan to get some of it.

A single creditor, who does not himself make any motions or objections in the trial court, and file such objections in writing cannot step in to appeal from a denial of an order relating to a trustee's motion or anybody else's motion and carry on an appeal on that

basis, on something he did not himself raise in the trial court.

As we have heretofore pointed out, the judgment was valid in every respect. Appellants have confused, and attempted to confuse this court, between the relation between a stockholder and that of a corporation.

Miller v. McColgan, 17 Cal. 2d
432, 436

The order of the trial Court confirming the plan became final forty days after it was entered June 25, 1957. No appeal was taken from it by anyone. Motions to vacate, like motions for a new trial, motions to rehear, not made by the party appellants, in no event extend the time for them to appeal.

CONCLUSION

This is a case where the well-known example of the shield becoming a sword applies. The appellants were hired to act as a shield for the appellee corporation, to protect and preserve it. When their efforts failed they attempted to stab it, and by these proceedings use a sword to destroy, if possible, what they were hired to protect and preserve.

We respectfully pray that this court dismiss their attempted appeal from the orders denying the motion of the trustee to set aside the plan of arrangement and affirm

the orders of the trial court as to their attorney fees.

Respectfully submitted,

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